Supreme Court, U.S.
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No. 04-____

IN THE

Supreme Court of the United States

LEON WOLFORD,
Petitioner,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

September 17, 2004

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit so far depart from the ordinary course of judicial proceedings as to justify a summary reversal of its judgment by failing to take the evidence in the light most favorable to the verdict winner and instead made its own factual finding that petitioner was not injured by the fraud that was perpetrated upon him?

PARTIES TO THE PROCEEDING

Leon Wolford was the plaintiff-appellee in the proceedings below.

Massachusetts Mutual Life Insurance Company was a defendant in the district court proceedings and the appellant in the court of appeals proceedings.

MML Pension Insurance Company and C.M. Life Insurance Company were defendants in the district court proceedings, but they did not participate in the court of appeals proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Leon Wolford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Pet. App. 8a-66a) is unreported. The court of appeals' opinion (*id.* at 1a-7a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on February 24, 2004. A petition for rehearing was denied on May 20, 2004. Pet. App. 67a. On August 9, 2004, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 17, 2004. *Id.* at 68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 50 is set forth at Pet. App. 69a-71a.

INTRODUCTION

In its opinion below, the United States Court of Appeals for the Sixth Circuit cast aside the findings of the jury, which had been reviewed and affirmed by the district court on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. The jury expressly found on their verdict form that petitioner had proven all of the elements of fraud and had been damaged in the amount of $1.9 million by that fraud. However, the Sixth Circuit disregarded those factual findings and instead determined, on the strength of its review of the testimony in the cold record, that petitioner would have been victimized and fired by the insurance company for which he served as an agent regardless of the fraud that it perpetrated against petitioner. The court therefore held that petitioner had suffered no damages. That reweighing of the evidence is precisely what Rule 50 and the Seventh Amendment forbid. The court's judgment thus represents a radical departure from the ordinary course of proceedings in the Courts of Appeals. Because that departure from normal standards is so severe – no other appellate court has so broadly viewed its power to review a Rule 50 motion – and the personal consequences to petitioner so devastating, summary reversal is warranted.

STATEMENT

Petitioner Leon Wolford ("Wolford") had been a special agent representing respondent Massachusetts Mutual Life Insurance Company ("MassMutual") for more than two decades when the events that led to this case occurred. He worked with MassMutual as a special agent pursuant to a series of career contracts entered into with general agents of MassMutual, most recently general agent Tom King ("King"). Wolford was recognized as a valuable producer for MassMutual. As a reward for his productivity, he was entitled to vested commissions, for the first five (5) years of the policies, on the sales he made, so long as the premiums on those policies were paid, even if his career contract were terminated. Moreover, for as long as he remained

under a career contract with MassMutual's general agent King, he was entitled to collect certain non-vested commissions, after five (5) policy years, on those sales as well. *See* Pet. App. 1a-2a; C.A. App. 193. The non-vested commissions were lost however if Wolford's career contract were terminated.

In the early 1990s, Wolford and MassMutual collaborated to create a new type of insurance package for employees and managers of coal mines. Those policies were designed to take the place of state workers' compensation programs. The package involved insurance to coal miners who worked underground no more than six (later eight) hours per week. A vice-president of MassMutual had "worked directly with Wolford and approved the package, believing it would be good for both MassMutual and miners." Pet. App. 20a. As any good agent would, Wolford aggressively marketed this new policy to miners. Although MassMutual obviously believed at the program's inception that such a line of business would be profitable, it eventually came to regret its decision to issue those kinds of policies. Claims mounted and MassMutual's financial exposure increased so much that the amount of the claims ($1,096,869) it had paid on these policies was virtually the same as the non-vested commissions ($1,000,000) it owed to Wolford. *See* C.A. App. 1057-58, 1271-74.

To recoup its losses, MassMutual undertook a scheme to force Wolford's resignation so that it could avoid paying commissions to him. MassMutual launched an investigation of Wolford's practices in issuing the insurance policies for the miners. Based on what it purportedly learned, MassMutual falsely claimed that Wolford had violated several of its rules and policies. MassMutual's persistent campaign of lies and fraudulent misrepresentations was aimed at convincing its general agent, King, to terminate Wolford's career contract. In furtherance of this plan, it told King that Wolford had violated MassMutual's rules for filling out claim forms; that Wolford had intentionally submitted applications from unqualified miners; and that

Wolford had committed insurance fraud by falsifying a claim form. In time, discovery demonstrated that each of those accusations was false and, indeed, that MassMutual knew at the time that each of these claims was false.[1] The falsity of the representations was confirmed by the jury's verdict, by the district court's ruling on MassMutual's Rule 50 motion, and even by the Sixth Circuit itself. *See* Pet. App. 2a-3a.

Eventually, MassMutual made the false representation, through its general agent King, that, if Wolford were to resign his career contract and instead take a broker's contract, he would retain certain benefits, and that, if he did not, he would face criminal charges and possibly other proceedings against him. *See* C.A. App. 502 (letter from King to Wolford stating that it appeared that Wolford had defrauded MassMutual and thus faced "lifetime cancellation of [his] insurance and securities licenses, financial loss to [him], for losses MassMutual have [*sic*] as a result of you[r] actions, possibly millions, *and possible time in jail*") (emphasis added). Wolford resigned his career contract in reliance on MassMutual's representations and entered into a broker's contract.[2] Wolford's career contract

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[1] As but one example of MassMutual's tactics, MassMutual accused Wolford of falsifying application information for nine miners. MassMutual later noticed the deposition of nine miners, and, after the videotaped depositions of the first five miners revealed that Wolford had done nothing wrong, MassMutual cancelled the remaining four depositions. *See* Pet. App. 22a-23a.

[2] Under a career contract, Wolford was entitled to have health insurance and pension benefits, whereas under a broker's contract he was not. The Sixth Circuit cited generic testimony suggesting that Wolford's commission entitlements would be the same under either type of contract, *see* C.A. App. 945, but ignored more specific testimony showing that he lost certain of his commissions as a result of the resignation, *see id.* at 1280-81. Vested commissions under the career contract were for premiums for up to five (5) years from the inception of the policies, even if the career contract was terminated during that five (5) year period. Non-vested commissions – *i.e.*, those after five (5) years from policy inception – were forfeited if the career contract was terminated.

provided that vested commissions were those paid during the first five (5) years on any insurance policies sold by Wolford. Non-vested commissions were paid to Wolford for premiums paid after year five (5) of the policies. Termination of the career contract for any reason meant the non-vested commissions were lost, but termination of the contract did not result in the loss of vested commissions. *See id.* at 193. Mass-Mutual produced documents that proved that Wolford's non-vested commissions under his career contract were more than $900,000 as of 1996. *See id.* at 506-07. King testified that Wolford's non-vested renewal commissions were more than $1 million when he resigned in 1997. *See id.* at 1057-58.

Unlike the career contract, the broker contract makes no provision for vested commissions. *See id.* at 466-67. King explained that he negotiated approval of the broker's contract for Wolford with MassMutual's executives before Wolford resigned. He did so to allow Wolford to continue servicing his existing clients, particularly the pension plans, annuities, and life insurance to prevent that business from leaving MassMutual. Wolford would not be allowed to solicit new customers under the broker's contract. *See id.* at 1041-42. That broker's contract was terminated by MassMutual approximately two months later. *See id.* at 465-67, 473-74, 1041-43, 1045. Wolford subsequently commenced this action.

2. At trial, the jury heard King's testimony that he would not have considered firing Wolford absent the campaign of misinformation undertaken by MassMutual, which sought to portray Wolford as a "rogue agent." C.A. App. 1037. Indeed, King testified that MassMutual had (falsely) represented to him that it had witnesses who would testify that Wolford had lied on their applications and that some insureds would claim Wolford never told them they could not work underground. King testified that these lies led him to tell Wolford that Wolford had "a deep hole to dig out of." *Id.* at 502 (Tr. King).

After hearing all of the evidence of MassMutual's scheme to induce Wolford to resign and thereafter use his commissions to defray its losses, the jury returned a verdict in Wolford's favor, finding that MassMutual had defrauded him and that he had been damaged in the amount of $1.9 million. In its Rule 50 motion in the trial court, MassMutual argued, among other things, that Wolford had not been damaged by the resignation that it had induced, because Wolford operated under an at-will contract that MassMutual could have chosen to terminate without penalty at any time. Respondent nonetheless said that "upon [petitioner's] termination [petitioner] would continue to receive certain 'vested commisions' but would lose any 'non-vested commissions.'" *Id.* at 771-72.

In a point expressly affirmed by the Sixth Circuit, the district court held that MassMutual "had no direct power to terminate Wolford under his contract." Pet. App. 2a. Instead, the general agent who had contracted with Wolford, King, had that authority. Accordingly, MassMutual's fraudulent scheme was necessary to reach its desired end, and the district court denied MassMutual's Rule 50 motion. The district court explicitly found:

> MassMutual's fraud damaged Wolford: Damages to Wolford included his loss of non-vested renewal commissions of approximately $1 Million, fringe benefits, office expenses, pension benefits . . . . Wolford avers MassMutual's termination of the broker contract was deceptive, but, even if he had not been granted a broker contract, *severe damage to him had already been caused by MassMutual's fraudulent inducement to resign from his career contract.*

Id. at 43a-44a (emphasis added).

* * * * *

> The jury was presented with evidence Wolford suffered the following damages:
>
> (1) lost renewal commissions of approximately $1,000,000;
>
> (2) lost pension benefits of nearly $400,000;
>
> (3) lost annual office expense reimbursement of 35% of his compensation, which totals approximately $125,000, i.e., $50,000 per year from July 1997-May 2000;
>
> (4) lost fringe benefits of $70,000, i.e., $28,000 x 2-1/2 years; and
>
> (5) lost income between July 1997 and the trial of approximately $399,400
>
> Thus, Wolford's damages as of the trial date were at least $1,994.000.

Id. at 59a.

MassMutual appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit.

3. The court of appeals reversed the district court's denial of MassMutual's Rule 50 motion. Pet. App. 1a-7a. It held that Wolford had not suffered any damages from MassMutual's fraudulent misrepresentations because, the court reasoned, Wolford would have been fired from his position by King had he not resigned. *See id.* at 6a-7a. In the court's view, Wolford could not establish a causal link to damages from his resignation because King would have fired him anyway.

REASONS FOR GRANTING THE PETITION

The court of appeals entirely supplanted the jury's role by reweighing the evidence and testimony based on the cold record. To reach its holding predicated on what hypothetically would have happened without MassMutual's fraud, the court entirely discounted King's testimony that he would not have fired Wolford absent MassMutual's scheme. The jury heard all of the evidence in the case and properly found that Wolford would never have resigned absent MassMutual's lies, and that King would not have terminated him either. The Sixth Circuit's decision, which is directly contradicted by evidence that clearly supports the jury's verdict, is a clear violation of Federal Rule of Civil Procedure 50. That rule requires that, on appellate review, the evidence must be taken in the light most favorable to the party that won the jury verdict. Although this Court ordinarily does not sit in review of errors, the court of appeals' judgment is such an unusual departure from the ordinary course of judicial proceedings in a case involving devastating personal consequences that this Court should exercise its authority to correct the court of appeals' error by summary reversal.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE SIXTH CIRCUIT'S MANIFEST DISREGARD OF RULE 50

The Sixth Circuit's crucial error came in reversing the jury's finding that Wolford was fraudulently induced by MassMutual to resign from his career contract and suffered damages as a result. The jury, the district court, and the court of appeals all agreed that Wolford's resignation was caused by MassMutual's fraud. Thus, the Sixth Circuit recognized that, "had the fraud not occurred, Wolford would not have resigned." Pet. App. 7a. However, it nevertheless reversed the jury's verdict on the strength of its erroneous factual finding that, even absent the fraud, "King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without

the non-vested commissions or other damages he claims." *Id.*

The Sixth Circuit's factual finding in this regard relies on nothing more than King's statement that, had Wolford not resigned, King would have fired him. That testimony – stripped of its evidentiary context, including King's other testimony – is woefully insufficient to overturn the jury's verdict under Rule 50. The record contains substantial evidence that the jury reasonably accepted. That evidence fully supported the verdict that MassMutual's fraud caused Wolford's damages.

A. The Sixth Circuit Was Obliged To Review The Evidence In The Light Most Favorable To Petitioner

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 202 (1986), this Court stated that, when deciding a Rule 50 motion,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.

Id. at 252.

In considering a Rule 50 motion, this Court has stressed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review *all of the evidence in*

the record." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000) (emphasis added). *See also, e.g., Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 554-55 (1990) (noting that, on motion for directed verdict, "the court does not weigh the evidence but draws all factual inferences in favor of the nonmoving party").

B. Overwhelming Evidence Of MassMutual's Fraud Supports The Jury's Verdict

The jury unquestionably had sufficient evidence to support its conclusion that MassMutual committed fraud and that Wolford suffered damages from that misconduct. After resigning from his career contract, Wolford entered into a broker contract with MassMutual. He resigned his career contract at King's suggestion to retain his renewal commissions, as well as to avoid: losing his securities and insurance licenses, facing threatened criminal prosecution by MassMutual, and losing millions of dollars in commissions from MassMutual. Ample evidence, which the jury and the district court accepted, proved that, but for MassMutual's fraud, neither resignation nor termination would have occurred.

King testified that MassMutual's false accusations at a June 1997 meeting had convinced him that Wolford was a "rogue agent." C.A. App. 1037 (Tr. King). He also stated that, but for MassMutual's persistent, fraudulent accusations, which lasted for months on end, he would never have considered terminating Wolford. King testified that he believed at the time that MassMutual's false accusations against Wolford were the truth. *See id.* at 1093, 1100 (Tr. King). King stated that, after MassMutual made its accusations, he told Wolford he would have to terminate Wolford unless Wolford could prove that those accusations were false. *See id.* at 1093-96 (Tr. King). Most importantly, King confirmed that he would not terminate an employee unless he was convinced that they had broken the rules:

> Q. Had you an employee that the same information was presented to you by the field Practices Review Committee, that is, that the person was violating company rules, misrepresenting policies, and changing documents, would you terminate that person?
>
> A. I would not have terminated that person without asking them to prove that the evidence that I had was inaccurate . . . . I would not have terminated the person unless I had given the person an opportunity and a full opportunity to explain the situation and to defend their position. I would never have terminated a person saying they did something, knowing that they have a clean reputation . . . .

Id. at 1104-05 (Tr. King).

The evidence in the record from King demonstrated how MassMutual's accusations about Wolford's alleged misconduct – which all proved to be untrue – poisoned King against Wolford. For example:

- King testified that following his June 1997 meeting he was convinced by MassMutual's false accusations that Wolford was a "bad apple" and a "rogue agent." King testified that he told Wolford: "Leon, buddy, I don't know how you could have done all this stuff. I don't even know what it all is. Did they tell you (Wolford) what they said you did? He said 'Well they wouldn't give me any names but they are accusing me of doing this and accusing me of doing that.'" *Id.* at 1037 (Tr. King).

- King stated that, based on the false accusations at the June 1997 meeting, "I knew what they described was a rogue agent I couldn't believe could have occurred, I know that I was very frustrated and I know that I felt Leon had let me down and disappointed me and how he could have pulled off the things they said he did were beyond my comprehension." *Id.* at 1093-94 (Tr. King).
- King said that MassMutual told him they had "five people that are willing to testify that Leon Wolford lied on their applications. We have ten people that are willing to say that Leon Wolford never told us we could go underground or couldn't go underground. We have these numbers of people that did this. Every time I asked for a name, they wouldn't give it to me." *Id.* at 1095 (Tr. King).
- King testified that he told Wolford he "better take the information you got and piece it together and find out what the heck they are talking about or they'll come after your whole pocketbook." *Id.* (Tr. King).
- King believed that he would be forced by MassMutual to terminate Wolford's career contract and that, if he refused, "They would terminate me, if I didn't terminate him." *Id.* at 1090 (Tr. King).

Wolford also introduced a substantial amount of evidence showing that MassMutual had every motivation to induce his resignation, because it had no right or power to terminate him lawfully and it wanted to offset claims from his clients with his non-vested commissions. *See id.* at 956-57, 1185-86, 1229-30, 1250. King testified that Wolford's non-vested commissions were more than $1 mil-

lion when the 1996 and 1997 totals were included. *See id.* at 1057-58. MassMutual admitted the real reason Wolford was losing his commissions was to compensate for the claims for benefits from Wolford's clients (*see id.* at 1059), which totaled approximately $1.4 million (*see id.* at 1271-74). MassMutual conceded that its decision to insure miners had been a mistake (*see id.* at 1161) and that, after the claims first arose, it began looking for a smoking gun to use against Wolford (*see id.* at 1182, 1185-6). During its sham investigation, MassMutual's vice-president requested that the amount of Wolford's commissions be calculated. *See id.* at 1230-31, 1250. All of that evidence lends further support to the jury's verdict that MassMutual committed fraud so that it could recoup its losses on insurance contracts out of Wolford's commissions.

It would be contrary to the evidence, and strongly against the reasonable inferences that must be drawn in Wolford's favor, to conclude that he would have resigned on his own and forfeited his non-vested commissions and pension. The court of appeals correctly concluded that, but for MassMutual's fraud, Wolford would not have resigned. *See* Pet. App. 6a-7a. Moreover, there was also legally sufficient evidence in the record to support the jury's implicit finding that King would not have fired Wolford but for MassMutual's fraud.

C. The Court Of Appeals' Explanation For Overturning The Jury Verdict Has No Merit

In reversing the jury's verdict in the face of the foregoing evidence that King would never have considered terminating Wolford but for MassMutual's fraud, the Sixth Circuit improperly reweighed the evidence and reached a conclusion that Rule 50 simply does not permit. The court drew unreasonable inferences in favor of MassMutual, namely that King would have fired Wolford even if MassMutual had not falsely accused Wolford and used those false accusations as its basis for requesting that King terminate Wolford. *See* Pet. App. 7a n.2 ("Wolford argues that King testified that he would not have fired

Wolford without a reason, but this testimony was only referring to MassMutual's initial request."). That conclusion is sheer speculation, impermissibly draws an inference in *MassMutual's* favor, and is not supported by the record facts set forth above. *See, e.g., Galloway v. United States*, 319 U.S. 372, 395 (1943) ("Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.").

One indicium of the Sixth Circuit's utter disregard of the trial proceedings is that its opinion reversing the district court's denial of MassMutual's Rule 50 motion does not contain a single mention of the district court's 65-page opinion denying that motion. This Court has warned that "courts of appeal should 'be constantly alert' to 'the trial judge's first-hand knowledge of witnesses, testimony, and issues'; in other words, appellate courts should give due consideration to the first instance decision maker's 'feel for the overall case.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 443-44 (2000). When this Court considers a case in which a jury verdict has been reversed by a circuit court, "[p]art of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal." *Neely v. Martin L. Eby Constr. Co.*, 386 U.S. 317, 325 (1967).

The court of appeals also overlooked MassMutual's letters to King requesting Wolford's termination. For example, MassMutual's first request in March 1997 to terminate Wolford gave as its reason only the claim form. *See* C.A. App. 439. Its letters on July 8 and 11, 1997, list both the claim form and solicitation of unqualified miners as bases for their request that King terminate Wolford. *See id.* at 463-64.

The district court heard and saw all the evidence; it reviewed MassMutual's Rule 50 motion and briefs; and it found the evidence clearly sufficient to support the verdict

reached by the jury. Pet. App. 38a-47a, 58a-61a. The court of appeals made no reference to the district court's careful consideration of the issues in this case. Instead, it merely reversed that decision by speculating about matters contradicted by the evidence. That kind of substitution of the trial court's and jury's judgment eviscerates the jury trial right and Reexamination Clause of the Seventh Amendment and impermissibly negates the "essential characteristic" allocating the "functions between judge and jury." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 365 U.S. 525, 537 (1958). *See also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (noting that the "controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts . . . both parties are entitled to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages [because] [b]oth are questions of fact").

The evidence and the standards for Rule 50 review dictate the only proper conclusion that the court of appeals could have reached: "Had the fraud not occurred, Wolford would not have resigned [*and*] King would [*not*] have fired him, leaving Wolford in exactly the same position he [*was in before the fraud*] – that is, [*with*] the non-vested commissions [*and*] other damages he claims." The court of appeals should have upheld the jury's implicit finding that, but for MassMutual's fraud, Wolford would still be working for King under his career contract and would still be receiving all the benefits of that contract.

The Sixth Circuit's decision is contrary to decades of jurisprudence in civil cases concerning the respective division of functions between judge and jury under the Seventh Amendment. The Court has said that an essential characteristic of the federal system

> is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and under the influence – if not the command – of the Seventh

> Amendment, assigned the decisions of disputed questions of fact to the jury.

Byrd, 356 U.S. at 537-38.

The Sixth Circuit's decision that, as a factual matter, King would have terminated Wolford even if MassMutual had not behaved fraudulently not only usurped the jury's fact-finding function, but also misapprehended the essence of the cause and effect of the fraud in this case and the substantive state law remedy for fraud. The court of appeals identified the remedy for fraud and stated:

> The damages for fraud are calculated by placing the injured party in the same position he would have occupied had the fraud not occurred. Here, had the fraud not occurred, Wolford would not have resigned *but King would have fired him*, leaving Wolford in exactly the same position he is in now – that is, without the non-vested commissions or other damages he claims.

Pet. App. 7a (emphasis added; citation omitted). The issue is not where Wolford would be *but for his resignation*, *i.e.*, terminated by King, as the court of appeals misapprehended. The issue is where Wolford would be *but for MassMutual's fraud*, *i.e.*, with his career contract in place, and retaining his non-vested commissions of $1 million, his $600,000 in pension, and his other benefits.[3]

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[3] There is further evidence that the court of appeals simply misapprehended the testimony in this case. It overlooked evidence that, once Wolford resigned his career contract, he lost his non-vested commissions of more than $700,000 and pension benefits of more than $600,000. *See* C.A. App. 1280-81. The court of appeals opined that "[i]t was only after King, at MassMutual's direction, terminated the broker contract that Wolford lost his non-vested commissions." Pet. App. 5a (citing C.A. App. 945). That conclusion ignored testimony from MassMutual's executive that, upon the termination of his career contract, Wolford lost non-vested renewal commissions and other compensation. *See* C.A. App. 1280-81; *supra* note 2. Thus, despite the court of appeals' erroneous factual finding, those damages are directly traceable

Instead of accepting the jury's view of the evidence, the court of appeals drew an inference quite to the contrary, concluding that King would have fired Wolford had he not resigned. That faulty inference is the crux of the Sixth Circuit's decision to reverse the jury's verdict. It required reliance on judicially imagined evidence that is irreconcilable with the record facts – *i.e.*, but for the fraud King would still have terminated Wolford. And, indeed, had King actually terminated Wolford's career contract as a result of MassMutual's defamatory misrepresentations, Wolford would have been injured, but he would not have been without a remedy. Besides fraud, he could have also sued for defamation of character, pursuant to *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152 (Tenn. Ct. App. 1997); civil conspiracy under *Brown v. Birman Managed Care*, 42 S.W.2d 62 (Tenn. 2001), because King's contract with Wolford was in King's individual capacity, not as MassMutual's agent; and outrageous conduct as permitted by *Medley v. A. W. Chesterton Co.*, 912 S.W.2d 748 (Tenn. Ct. App. 1995). However, because Wolford's career contract was not terminated by King, any claim for wrongful termination would surely have been challenged by claiming that Wolford resigned, which ultimately would lead back to the fraudulent inducement claims that were the basis of the jury's verdict.

The Sixth Circuit acknowledged that MassMutual's fraud caused Wolford's resignation, yet it refused to acknowledge the damages Wolford suffered as a result of that fraud. Neither resignation nor termination would have occurred but for MassMutual's fraudulent and pretextual scheme against him. MassMutual admitted to King that it wanted to offset the claim payments it had to make to Wolford's clients against Wolford's non-vested commissions, and that the reason for its accusations was "the liability he [Wolford] created for the home office."

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to MassMutual's efforts to induce Wolford's resignation from his career contract, and are separate and distinct from termination of the broker's contract.

C.A. App. 1058-59. The district court's opinion states: "Thus by inducing his resignation, MassMutual could capture Wolford's commissions to set-off against the insurance claims. As King put it: "I asked the question, why are they not going to release the renewal streams and so forth. . . . The answer given to me was 'a large reason is the liability he created for the Home Office.'" Pet. App. 47a.

D. Summary Reversal Is An Appropriate Disposition

The Sixth Circuit's judgment so far departs from the correct manner of reviewing Rule 50 motions that summary reversal is warranted. This Court has exercised its authority to reverse summarily in cases in which the judgment it is reviewing is so extreme that full review and briefing on the merits would merely announce a rule that every other court properly understands and applies.

As Wright and Miller explain, this Court "in a little noticed series of per curiam opinions . . . has reversed judgments of lower courts that had substituted their views of the sufficiency of the evidence for that of the jury." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2526, at 281 (2d ed. 1995). These cases include: *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956), *rev'g* 232 F.2d 13 (5th Cir. 1956); *Union Trust Co. v. Eastern Air Lines, Inc.*, 350 U.S. 907 (1955), *rev'g* 221 F.2d 62 (D.C. Cir. 1955); *Swafford v. Atlantic Coast Line R.R.*, 350 U.S. 807 (1955), *rev'g* 220 F.2d 901 (5th Cir. 1955); and *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (1954), *rev'g* 210 F.2d 477 (5th Cir. 1954). The Sixth Circuit did not review the evidence of the eight-day trial, nor did it discuss the district court's comprehensive ruling denying MassMutual's Rule 50 motion. Instead, the court of appeals' opinion casts a blind eye upon a malicious and concerted fraudulent scheme to strip a 25-year career agent of nearly $2 million. It disassociated MassMutual's fraud – the cause of Wolford's resignation and reason for King's statement that he would have terminated Wolford

had he not resigned – from the effect of the fraud in causing Wolford's damages. The facts as recited by the Sixth Circuit do not exist in the record; indeed, that version of the facts is the diametric opposite of the facts presented at trial and reasonably relied on by the jury and the district court.

For the Due Process Clause of the Fifth Amendment and the Right to Jury Trial and Reexamination Clauses of the Seventh Amendment to retain their vitality, this Court should summarily reverse the Sixth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

September 17, 2004

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5694 & 02-6336

LEON WOLFORD,
Plaintiff-Appellee,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellant.

[Decided Feb. 24, 2004]

SILER, Circuit Judge.

In this Tennessee diversity case, a jury found that Massachusetts Mutual Life Insurance Company ("MassMutual") fraudulently induced Leon Wolford into resigning his "career" contract with General Agent Tom King. MassMutual appeals the district court's denial of its multiple post-judgment relief motions arguing that (1) it cannot be liable of fraudulently inducing Wolford to resign his contract when the contract was at-will; (2) there was insufficient evidence for the jury to find fraud; (3) the district court improperly awarded punitive damages; and (4) the district court should have reopened the case based on the discovery of a recording of the telephone conversation between its agent King and Wolford during which the fraudulent inducement occurred. We REVERSE for the reasons stated hereafter.

FACTUAL BACKGROUND

MassMutual contracts with "general agents" to sell and maintain its insurance policies. The "general agents" in turn contract with "special agents" to also sell and maintain the policies. Pursuant to this arrangement, MassMutual entered into an at-will contract with General

Agent King, who in turn entered into an at-will "career" contract with Special Agent Wolford. Under this career contract, Wolford would collect "non-vested" renewal and persistency commissions in the future as long as he was still under this contract. When Wolford eventually resigned, these renewals totaled approximately $1 million.

In March 1997, allegations surfaced accusing Wolford of falsely adding to a doctor's report on an insured client's claim and of extending policies to ineligible people. Wolford had come up with an attractive "package" for coal miners providing life, disability, and health insurance as an alternative to costly worker's compensation insurance. MassMutual had a requirement that no policy be issued to a miner who worked more than six hours per week underground. The allegations accused Wolford of misrepresenting several miners' job titles to get around this requirement and also of filling in parts of a doctor's certification regarding the claim of Grant Norman under his insurance policy. MassMutual's Field Practices Committee ("FPC") investigated these allegations and elected to terminate Wolford.

However, because MassMutual had no direct power to terminate Wolford under his contract, it directed King to fire Wolford. MassMutual asked King to terminate Wolford, but King resisted, wanting to know MassMutual's reasons. MassMutual claimed that Wolford improperly supplemented the doctor's report. After it was found that MassMutual arguably required agents to fill in the doctor's reports as Wolford had, MassMutual then asserted that Wolford's additions were incorrect. Again, MassMutual was wrong; the doctor later confirmed Wolford's additions. After King's resistance and request for further investigation, the FPC further investigated the allegations.

In June 1997, MassMutual's FPC told King and Wolford that the investigation had uncovered that the miners were ineligible, and accused Wolford of insurance fraud. (Litigation discovery later proved MassMutual's investigation uncovered that the miners were in fact eligible for

the policies.). Wolford's request for specifics was rebuffed by MassMutual. On June 6, King told Wolford that he might face legal actions for fraud, resulting in heavy monetary liability and possible jail time. On July 8, 1997, MassMutual again directed King to terminate Wolford.

On July 13, 1997, King instead opted to telephone Wolford, informing him that he might be terminated soon and advising Wolford to resign and take a broker contract with MassMutual. King suggested that if Wolford was fired he would have trouble getting another job with a premium insurance agency and that by taking the broker contract Wolford would continue to receive his non-vested renewal and persistency commissions. Wolford resigned and signed the broker contract the next day. The broker contract was signed and approved by MassMutual on August 4, 1997. On September 22, 1997, pursuant to MassMutual's direction, King terminated the broker contract.

PROCEDURAL BACKGROUND

Wolford filed suit alleging (1) MassMutual tortiously interfered with his contract with King; and (2) MassMutual made, through its Agent King, intentional misrepresenttations that induced him to resign his career contract. MassMutual filed a counterclaim against Wolford.

At trial, the jury found that MassMutual (1) was a party to both Wolford's career and broker contracts with King; and (2) made intentional misrepresentations to Wolford to induce him to resign his career contract with King. It granted $1.9 million in compensatory damages and $54.9 million in punitive damages, and rejected MassMutual's counterclaims.

MassMutual, pursuant to Fed.R.Civ.P. 50 and 59, requested that the district court enter judgment dismissing Wolford's claim or, in the alternative, grant a new trial or a remittitur. MassMutual also moved, pursuant to Rules 58, 59(e), and 60, to amend, correct, and/or vacate the district court's judgment. The district court rejected all of MassMutual's post-trial motions, but it eventually remitted the punitive damages to $7.6 million.

During the pendency of this first appeal (No. 01-5694), MassMutual discovered allegedly new evidence. After the verdict in Wolford's favor, King instituted an action against MassMutual for, *inter alia*, tortious interference with his contract with Wolford. MassMutual learned that King had recorded the telephone conversation between Wolford and King regarding Wolford's resignation. Wolford was not aware that King had recorded the conversation.

MassMutual moved for relief from judgment in the instant case (No. 01-5694). Premised upon Rule 60(b)(2), MassMutual argued that the audiotape recording was newly discovered evidence which contradicted both Wolford's and King's trial testimony in the Wolford litigation and would have likely altered the outcome of the case. Furthermore, pursuant to Fed.R.Civ.P. 60(b)(3), MassMutual alleged that King and Wolford concealed the recording and provided false testimony. Finally, MassMutual maintained that it was entitled to relief under the catch-all provision, Fed.R.Civ.P. 60(b)(6).

The district court denied all of MassMutual's motions under Rule 60(b). Although finding MassMutual exercised due diligence in obtaining the recording, the district court ruled that MassMutual failed to demonstrate that the recording was material evidence that would have clearly produced a different result at trial. As the recording did not constitute newly discovered evidence, MassMutual had no other recourse under Rule 60(b). This second appeal (No. 02-6336) followed, and was consolidated with the first appeal.

DISCUSSION

Sufficiency of the Evidence

The jury found that MassMutual fraudulently induced Wolford to resign his career contract. In a diversity case, this court reviews a Rule 50 sufficiency of the evidence claim under the forum state's standard of review. *See K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir.1996). Under Tennessee law, when ruling on a Rule

50 motion, "the trial court should consider all evidence introduced by the non-moving party, draw all reasonable inferences from that evidence, disregard all countervailing evidence and, if there is any competent evidence about which reasonable minds could differ, the trial court should overrule the motion." *Harrogate Corp. v. Sys. Sales Corp.*, 915 S.W.2d 812, 817 (Tenn.Ct.App.1995) (citation omitted).

Fraud in Tennessee requires proof of: (1) an intentional misrepresentation of material fact, (2) involving a past or existing fact (or promise of future action with no present intent to perform), (3) knowledge of the representation's falsity, and (4) an injury caused by reasonable reliance on the representation. *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566-567 (6th Cir.2003). Without belaboring the other elements, any fraud by MassMutual did not injure Wolford.

Interestingly, Wolford did not initially lose his commissions by resigning. If King had not terminated the broker contract, Wolford would have continued to receive all his commissions, including the non-vested. (J.A. 01-5694, at 945.) It was only after King, at MassMutual's direction, terminated the broker contract that Wolford lost his non-vested commissions. However, Wolford had no actionable claim for the loss of this contract against MassMutual. He cannot bring a wrongful termination claim against MassMutual because King was the only party with the direct power to fire Wolford.[1] Since MassMutual, even though it was a party, did not have the direct power to terminate Wolford, any claim regarding the loss of his broker contract would be a tortious interference claim

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[1] Because both the career and broker contracts between Wolford and King were "at-will," King cannot be held liable for the termination under Tennessee's strict "at-will" contract doctrine. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn.1997) (An at-will contract may be terminated by either party "for good cause, bad cause, or no cause at all without being guilty of legal wrong."). If Agent King cannot be liable, then any vicarious/agency type claim against MassMutual must fail.

against MassMutual. Generally, under Tennessee law, a party cannot tortiously interfere with its own contract. *See Purisch v. Tenn. Technological Univ.*, 76 F.3d 1414, 1420 (6th Cir.1996) ("A party to a contract cannot be held liable for procuring the breach of that contract."); *Forrester v. Stockstill*, 869 S.W.2d 328, 331 (Tenn.1994) (finding claim for wrongful interference by a third person actionable only if that person stood as third party to the employment relationship). Since the jury found that MassMutual was a party to the career and broker contracts, the district court dismissed the procurement/interference claim, and the parties have not appealed that issue.

Since Wolford cannot claim tortious interference or wrongful termination, the only fraud claim Wolford could assert is wrongful inducement to resign. Normally, this claim is brought when one employer uses a misrepresentation about duration, benefits, or financial strength to lure an employee from a job with another employer. When the employee has no breach of contract or wrongful termination action, courts have allowed the employee to assert a fraudulent inducement claim for the loss of the former job. The damage is the loss of pay or benefits. While Tennessee does not have any law directly on point, other state courts have allowed this type of fraud claim. *See, e.g., Liggett Group, Inc. v. Sunas*, 113 N.C.App. 19, 437 S.E.2d 674, 681 (1993); *Berger v. Sec. Pac. Info. Sys.*, 795 P.2d 1380, 1384 (Colo.Ct.App.1990) (relied on by the district court); *Sea-Land Serv. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647, 651-53 (1982). We assume without deciding that the Tennessee Supreme Court would also allow this type of fraud claim.

Wolford claimed damages of non-vested renewal commissions, fringe benefits, office expenses, pension benefits, and income from continued sales, things that he forfeited when he resigned – and things he would have lost had he been terminated. The evidence showed that if Wolford did not resign, King would have lawfully terminated him. At all times, both Wolford and King maintained that Wolford resigned specifically to avoid termination. King's

uncontroverted testimony stated that he would have fired Wolford had he not resigned.[2] (JA, 01-5694, at 1049-50.) Moreover, and most injurious to Wolford, King eventually terminated the broker contract at MassMutual's direction. (JA, 01-5694, at 473-74.)

The damages for fraud are calculated by placing the injured party in the same position he would have occupied had the fraud not occurred. *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 238 (Tenn.Ct.App.1998). Here, had the fraud not occurred, Wolford would not have resigned but King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without the non-vested commissions or other damages he claims.

Thus, we REVERSE the lower court's finding that there was sufficient evidence to find MassMutual liable for fraud because MassMutual's misrepresentations caused Wolford no injury. Consequently, since fraud was the only claim the jury returned in favor of Wolford, the punitive damages naturally must be dismissed, and there is no need to discuss any of MassMutual's remaining assignments of error.

REVERSED.

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[2] KING: ". . . I had planned if I did not receive an acceptance letter of his resignation I planned to go to Kingsport and . . . go through the termination process. Since I had received his letter of acceptance I didn't need to travel to Kingsport to do the termination."

Wolford argues that King testified that he would not have fired Wolford without a reason, but this testimony was only referring to MassMutual's initial request. (JA, 01-5694, at 1087-88).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:98-CV-110 (Phillips)

LEON WOLFORD,
Plaintiff/Counter-Defendant,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
MML PENSION INSURANCE COMPANY AND
C.M. LIFE INSURANCE COMPANY,
Defendants/Counter-Plaintiffs.

[Filed Apr. 23, 2001]

MEMORANDUM AND ORDER

Plaintiff Leon Wolford sued defendants for procurement of breach of contract and for intentional misrepresentation. The case was tried to a jury which found in favor of Wolford and awarded plaintiff compensatory damages of $1.9 Million Dollars and punitive damages of $54.9 Million Dollars on plaintiff's claim of intentional misrepresentation. The court suggested a remittitur of the punitive damages award to $7.6 Million Dollars. Defendants have moved the court for judgment N.O.V. or in the alternative for new trial or remittitur. Wolford has moved the court to modify and amend its suggestion of remittitur.

Background

Plaintiff Leon Wolford brought suit against defendants Massachusetts Mutual Life Insurance Company (Mass-

Mutual), MML Pension Insurance Company, and C.M. Life Insurance Company for procuring a of [*sic*] breach of his contracts with General Agent Tom King, and for committing a fraud upon him by inducing him to resign his position as a career agent with defendants upon the expectance that he would receive broker contracts with defendants.

Leon Wolford served for more than 20 years as a career agent under written contracts with various general agents for MassMutual. On January 1, 1990, Wolford entered career contracts with Tom King, general agent for defendants in the Tennessee Valley area. The career contracts were by their terms terminable at will.

Wolford sold insurance packages to coal mining companies as substitutions for workers' compensation benefits. Plaintiff would compile packages of insurance intended to approximate workers' compensation benefits including medical benefits, life insurance plans, and disability benefits. The disability and pension insurance plans sold by plaintiff in these packages were policies of insurance extended by defendants.

Defendants assert that their standards for selling disability insurance policies state that agents are prohibited from selling disability policies to employees or owners of coal mines who worked more than six or eight hours underground in a week. This underwriting limitation was imposed due to the unique hazards inherent in deep coal mining. In performing an investigation of disability claims, defendants alleged that they determined a large percentage of the disability insurance sold by plaintiff did not meet their underwriting requirements for disability policies.

Defendants advised Tom King, their general agent, that Wolford was not authorized to continue acting as a subagent in selling defendants' products. King was instructed by letter dated July 8, 1997 from defendants, to

terminate his contracts with Wolford. Tom King, who only sells products of defendants, advised Wolford of defendants' position. Wolford then sent a resignation letter to Tom King on July 13, 1997.

On July 14, 1997, Tom King issued broker contracts to Wolford. The broker contracts included a broker contract with Massachusetts Mutual Life Insurance, a broker contract with C.M. Life Insurance Company, and a broker contract with MML Bay State Life Insurance Company. The broker contracts with Massachusetts Mutual Life and C.M. Life were approved and accepted by defendants. On September 4, 1997, defendants notified Tom King that Wolford did not have authority to act as a broker on behalf of defendants. On September 22, 1997, Tom King notified Wolford that the broker contracts were being terminated.

Wolford filed suit against defendants for breach of contract and intentional misrepresentation on February 5, 1998.

Defendants flied a counterclaim against Wolford alleging he intentionally or negligently made misrepresentations to defendants as to the applications for disability insurance and other information upon which defendants relied in issuing insurance to applicants which enhanced defendants' risk of loss. Defendants asserted they incurred damages as the result of paying insurance claims to coal miners. Defendants sued Wolford asserting he breached his duty as an agent or sub-agent in violation of his career agent's contract and in violation of his common law duties. Defendants further asserted claims for intentional misrepresentation, negligent misrepresentation, fraud and deceit.

This case was tried to a jury on May 3, 4, 5, 8, 9, 10 and 11, 2000, and the jury returned a verdict for Wolford against defendant Massachusetts Mutual Life Insurance Company, and awarded Wolford damages in the amount

of $1.9 Million Dollars. The jury found that Wolford established by a preponderance of the evidence that defendant Massachusetts Mutual Life Insurance Company made intentional misrepresentations to him to induce him to resign his career contracts with General Agent Tom King. The jury further found that Wolford was damaged as a proximate result of defendant Massachusetts Mutual Life Insurance Company's intentional misrepresentations to him. The jury found defendant Massachusetts Mutual Life Insurance Company 100% liable for Wolford's claims, and found no liability on the part of defendants, MML Pension Insurance Company and C.M. Life Insurance Company on Wolford's claims. Additionally, the jury found in favor of Wolford on defendants' counterclaims. The jury also found by clear and convincing evidence that defendant Massachusetts Mutual Life Insurance Company had acted intentionally, recklessly, maliciously, or fraudulently, and that Wolford was entitled to punitive damages [Doc. 109]. After a hearing on the amount of punitive damages on May 25, 2000, the jury awarded Wolford punitive damages of $54.9 Million Dollars [Doc. 114].

By memorandum and order entered August 1, 2000, the court reviewed the jury's verdict and directed the clerk to correct the judgment in this case as follows: (1) to enter judgment in favor of plaintiff against defendant Massachusetts Mutual Life Insurance Company in the amount of $1.9 Million Dollars compensatory damages, and that plaintiff recover nothing from defendants MML Pension Insurance Company and C.M. Life Insurance Company; (2) to enter judgment in favor of plaintiff against defendant Massachusetts Mutual Life Insurance Company in the amount of $54.9 Million Dollars punitive damages; (3) that plaintiff recover the costs of the action; and (4) to enter judgment in favor of plaintiff on defendants' counterclaims. In addition, the court suggested a remittitur of $47.3 Million Dollars of the punitive damages award, for a

remaining punitive damages award of $7.6 Million Dollars [Doc. 134].

Standard of Review

Defendant, Massachusetts Mutual Life Insurance Company (MassMutual), has moved the court to enter judgment as a matter of law, or, in the alternative, for a new trial or remittimr. Wolford has moved the court to modify and amend its suggestion of remittitur.

Jurisdiction in this case is based upon diversity of citizenship and the amount in controversy. 28 U.S.C. § 1332. The Sixth Circuit Court of Appeals has ruled that a federal court sitting in diversity reviews de nevo legal determinations raised by a motion under Rule 50, Federal Rules of Civil Procedure, and must apply the forum state's standard of review "only when a Rule 50 challenge is mounted to the sufficiency of the evidence supporting a jury's findings. No deference is appropriate in diversity cases to a trial court's resolution of legal issues." *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996).

Since MassMutual's Rule 50 motion is clearly based on a challenge to the sufficiency of the evidence supporting the jury's verdict, the court must look to the law of Tennessee to determine the standard under which defendant's motion is to be reviewed. Tennessee law requires that a motion for judgment as a matter of law be granted only if the court, after construing the evidence most strongly in favor of the non-movant and discarding all countervailing evidence, determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. "If there is any doubt as to the proper conclusion to be drawn from the evidence, the motion must be denied." *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994); *Werthen Bag Corp. v. Agnew*, 202 F.2d 110, 122-23 (6th Cir. 1953).

The Sixth Circuit has further ruled that a motion for new trial seeking a remittitur of a jury's verdict should be granted only if the award clearly exceeds the maximum amount which a jury could reasonably find to be compensatory for the plaintiff's loss. *Roush v. KFC Nat'l Management Co.*, Tenn. F.3d 392, 397 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 56 (1994). "Unless the award is (1) beyond the range supportable by proof or (2) so excessive as to shock the conscience, . . . or (3) the result of a mistake, we must let the award stand." *Leila Hosp. and Health Ctr. v. Xonics Medical Sys., Inc.*, 948 F.2d 271, 278 (6th Cir. 1991). In diversity cases, the trial court must apply the "damage-control standard state law supplies," subject to federal appellate review for abuse of discretion. *Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415 (1996). In *Gasperini*, New York statutory law required a determination that an award was excessive if it "deviates materially from what would be reasonable compensation." Concluding that this standard required closer court review than the traditional "shock the conscience" test, the Supreme Court held that Erie principles required application of the New York standard, which was arguably part of the procedural statute, because to hold otherwise could result in larger recoveries in federal court than those which a state court could entertain. *Gasperini v. Center For Humanities, Inc.*, 518 U.S. at 428-29; *Tatum v. Land*, 1997 WL 85144 (6th Cir. 1997) (unpublished opinion).

As stated by Judge Murrian in the recent decision of *Bivens v. Black*, 35 F. Supp.2d 607 (E.D. Tenn. 1999), the real importance of the Gasperini decision lies in its practical implications for the federal court system, in that the court announced new standards of review for new trial motions on excessiveness grounds in federal court. Under Tennessee substantive law, "the power of a trial judge to disturb a verdict because of his dissatisfaction with the amount of damages rest . . . on more than a century of precedent and practice." *Bivens v. Black, supra* at 609

(quoting *Foster v. Amcon Intern. Inc.*, 621 S.W.2d 142, 144 (Tenn. 1981)). It has been traditionally the standard in federal court in Tennessee, Judge Murrian observed, that it is the duty of a trial judge to set aside a verdict and grant a new trial if the judge is of the opinion that the verdict is against the great weight of the evidence or if a miscarriage would result if a new trial was not granted. *Bivens v. Black, supra* at 611 (*citing Turner v. United States*, 139 F. Supp. 30 (E.D. Tenn. 1954)), *aff'd* 229 F.2d 944 (6th Cir.), *cert. denied*, 351 U.S. 970 (1956), and *Sandlin v. Pearsall*, 427 F. Supp. 494 (E.D. Tenn. 1976).

Judge Murrian further observed that the Sixth Circuit Court of Appeals has spoken to the application of state law to diversity cases in regard to post-trial motions in *Tatum v. Land*, 1997 WL 85144 (6th Cir. 1997) (unpublished opinion). The Sixth Circuit has recently addressed these issues in the unreported decision of *Arch Trims, Inc. v. W. W. Grainger, Inc.*, 1998 WL 279376 (6th Cir. 1998) (unpublished case) wherein the Sixth Circuit reversed the trial court for granting defendant's motion for judgment as a matter of law because the trial court did not construe the evidence in a manner most favorable to the non-moving party. The Sixth Circuit further ruled that the court erred when it conditionally granted defendant's motion for a new trial because the verdict was contrary to the weight of the evidence. The Sixth Circuit held that after reviewing the evidence, the Appellate Court had to conclude that the district court's substitution of its reassessment of the evidence for that of the jury constituted an abuse of discretion. Thus, the case was remanded with instructions to enter judgment on the jury's verdict. *Arch Trims, Inc. v. W. W. Grainger, Inc., supra* at 10-11.

Under § 20-10-102(a), Tenn. Code Ann., a trial court in Tennessee, when a motion for a new trial has been filed, may suggest a remittitur when the trial judge is of the opinion that the verdict in favor of a party should be reduced. The statute also stipulates that in case the party

in whose favor the verdict has been rendered refuses to make the remittitur upon penalty of a new trial being awarded, the party in whose favor such verdict has been rendered may make the suggested remittitur under protest, and appeal from the action of the trial judge to the Court of Appeals. However, that is not the case in federal courts. In *Donavan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), the Supreme Court reaffirmed "the long-standing rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Id.* at 649. Thus, under *Donavan*, a plaintiff who accepts a remittitur, consents to the amended judgment and the vacating of the judgment on the verdict, and waives his right to appeal the remittitur order.

Evidence Presented at Trial

The evidence established that MassMutual is engaged in the insurance business. Wolford serwd for more than 20 years as a career agent under written contracts with various general agents for MassMutual. Wolford's last such contract was with Tom King, who was under a general agent contract with MassMutual. Wolford's contract with King, prepared by MassMutual, was designated as a "career contract." The parties to the contract were listed as Wolford and Tom King. MassMutual also signed the contract, expressing its approval and guaranteeing payment of commissions due and payable by King to Wolford in the event King was no longer general agent.

For more than 20 years, MassMutual issued policies on applications submitted by Wolford. In 1990 and 1991, MassMutual decided to accept applications from coal mine managers who worked underground no more than six to eight hours per week. Grant Norman, one such insured, was a superintendent and vice-president of Husky Mining Company.

In November 1996, Norman made a claim under his policy. In order to process the claim, MassMutual instructed Wolford to have Norman's family physician, Dr. Vellayan, complete an Attending Physican's Statement (APS). Dr. Vellayan only partially completed the form; he returned it to Norman and asked him to obtain certain information requested by the APS which he did not have directly available.

Norman contacted his employer's personnel manager and asked her for help with the paperwork. She arranged a meeting between Norman and Wolford at which Wolford was to assist in completing the APS form. Wolford reviewed the APS and noticed some unanswered questions. For example, to designate the projected period of disability, the form provided three boxes: "within 3 months," "within six months," or "longer." Dr. Vellayan checked "longer." The form also stated "explain" if "longer" were selected. Dr. Vellayan provided no explanation. According to Ms. Hurley and Wolford, Norman told them the doctor stated he could be disabled from working for up to two years. Norman recalled that he asked Wolford and Ms. Hurley to help him fill out the forms, and that it was possible he discussed his period of disability. Based on what Norman told him, Wolford added "maybe two years" to the APS box labeled "explain." Wolford also noticed other information on the Norman APS was left blank, filled in this information, then mailed the claim forms and APS to MassMutual's home offices.

A MassMutual claims representative who reviewed Norman's APS testified she determined the handwriting on the form was in two different types and the wording "maybe 2 years" was not customary language for physicians; she thus concluded that information had been added to the APS. She requested Dr. Vellayan's office provide its own copy of the Norman APS. That copy showed the incomplete answers to some questions.

The claims representative also contacted Norman, who explained that he had requested help with the claim forms from Wolford because he (Norman) did not "read or write too good." Norman also told her he was disabled from working, had no income, and requested she inform his bank as to when his disability payment would be forthcoming, to prevent his vehicle from being repossessed. Wolford testified he was aware of Norman's financial situation when he requested help completing the forms.

MassMutual's Vice-President Winter notified King about the questions regarding Norman's APS form. King contacted Wolford, who immediately told him he had supplied the information on the APS, and had done so to prevent a delay in processing Norman's claim. Wolford and King both advised MassMutual about the circumstances under which the forms had been completed and King specifically told MassMutual that Wolford had done exactly as he had been trained and advised to do by both King and MassMutual. MassMutual characterized the APS as analogous to insurance applications and "related documents." With respect to such applications and "related documents," MassMutual had instructed its agents to supply complete information if known. MassMutual admitted that its written instructions required the agent to complete requested medical information left incomplete.

By November 1996, MassMutual had received four or five claims by other clients of Wolford and became concerned about the "flurry" of claims. MassMutual's Senior Vice-President Foresi testified the first thing he heard about any concerns with Wolford was that there had been a number of claims. Tom King testified he first became aware of the concern about the claims in a November 1996, phone conversation with MassMutual's home office.

On March 18, 1997, MassMutual requested that King terminate his contract with Wolford. MassMutual's

expressed reason for requesting the termination was the Norman APS. Later that month, King traveled to MassMutual's home offices and met with a sub-group of MassMutual's Field Practices Committee (Field Practices). King explained that career agents were trained to complete answers as to medical information on claim forms and APS's, and that Wolford had not been trained to use explanatory cover letters in such situations. King had been MassMutual's general agent for 12 years and Norman's APS was the "only time I ever knew that an agent was not supposed to help a client fill out a claim form." King testified:

> . . . Again, that was a first time I had ever been made privy that you could get in trouble for adding information over a physician's signature, again because the Company has documents that told us to do that. I think you [referring to MassMutual] have them.
>
> Q. Can you identity the documents?
>
> A. They are in the form of e-mails. There is [sic] underwriters that confirmed that say you can do that. There are several office managers from around the country. We e-mailed a question out and said we need some help here. We are being told to do, when there is blank information left off of an Attending Physician's Statement we don't know what to do about it. In the past we have been told to just write it in. We got e-mails back that said, yes, that is what we do. That is what we have been trained to do. We got e-mails from people in the field that are in offices in the field. We got e-mails from even underwriters in the Home Office.

King also testified that he showed MassMutual the relevant e-mails from other general agents of MassMutual.

MassMutual's Vice President Gray inquired of Associate General Counsel Campbell whether MassMutual should change its written instructions requiring agents to complete incomplete forms. Campbell agreed the Wolford matter had probably drawn Gray's attention to these instructions and admitted he had searched in vain for a rule which restricted agents from completing APS forms.

MassMutual told King in March 1997, that Wolford had presented "incorrect information" about Norman's injury and about his job title. Norman, however, had confirmed to MassMutual's claim representative that he was a vice-president and superintendent for Husky Mining. Dr. Vellayan confirmed in writing to MassMutual's investigator that the information added to the APS was correct. Dr. Vellayan testified the information was correct, that he knew, even before Norman's neck surgery (which predated the APS), that Norman would never go back to work (which, Dr. Vellayan also testified, he told to Norman).

Various members of the Field Practices Committee continued to assert the information Wolford added to the APS form was incorrect. These members, who played central roles in the investigation of Wolford's conduct, included a senior vice-president, vice-presidents and associate general counsel. After King refused MassMutual's initial instruction to terminate Wolford's career contract, MassMutual suspended its instruction.

By the time King refused to terminate Wolford, MassMutual had prepared a "Report for the Division of Insurance Fraud Investigation Kentucky Department of Insurance" accusing Wolford of fraud. MassMutual never filed the report with the state. Also by this time, MassMutual's most experienced investigator had been instructed to visit Kentucky and get a signed statement from Dr. Vellayan about the information Wolford had

added to the APS. Dr. Vellayan confirmed that the information Wolford had added was correct.

MassMutual informed neither King nor Wolford of Dr. Vellayan's signed statement until it was obtained via formal discovery. MassMutual's Associate General Counsel Campbell testified the information Wolford added to the APS was inaccurate and misled MassMutual, despite Dr. Vellayan's and Norman's testimony to the contrary and Dr. Vellayan's statement the information Wolford added was correct. MassMutual initially claimed the Norman APS was its sole basis for instructing King to termimte his contract with Wolford.

Prior to investigating Wolford, MassMutual had full knowledge of Wolford's business model and marketing methods, which included providing disability and life insurance policies issued by MassMutual and providing health insurance policies issued by other companies. The insurance package provided coal company managers with coverage in lieu of state-sponsored worker's compensation. At its inception, MassMutual's Vice-President Foresi worked directly with Wolford and approved the package, believing it would be good for both MassMutual and miners.

As soon as MassMutual was called upon to make payments under those policies, MassMutual reconsidered insuring coal mine managers and concluded that the package had turned out to not be so good for MassMutual. Foresi admitted, according to the Field Practices chairman, that underwriting miners turned out to be a mistake. Wolford testified two of MassMutual's executives stated after the claims began that "coal miners were not good risks." Notwithstanding Foresi's knowledge and direct experience with Wolford, Foresi was not selected to participate in any of the face-to-face discussions with King or with Wolford concerning MassMutual's charges against

Wolford. In fact, Foresi was never even made aware such meetings occurred.

MassMutual's initial field investigation of Wolford was conducted by Investigator Joiner. Joiner, rather than telling Wolford the true reason for their meeting, told Wolford to take him around to meet with Wolford's Kentucky clients so that Joiner could "see how a top producer does it." MassMutual then assigned their most experienced investigator, Hunady, to the case. Hunady and Joiner interviewed over 30 people about Wolford, yet took no written statements other than from Dr. Vellayan, and made no tape recordings or videos.

On June 5, 1997, King requested the specifics as to names, incidents, etc., from those interviewed by MassMutual, but received no reply. King then wrote MassMutual on June 17, 1997, stating in part:

> I continue to be disturbed by what appears to be conflicting information regarding the Leon Wolford situation. Because Leon and I are not being made aware of the information developed by the investigators, it is impossible for Leon to defend himself . . . , one individual has overheard most of Leon's enrollments, the statements he makes, and the questions he asks. And, he can confirm that Leon never tells people to lie on the application to get coverage. If these people truly are in management, . . . then it seems Leon is being unreasonably accused . . . . Because he has not been provided any hard information to defend, he is essentially trying to defend himself against "ghosts." And every time he or I communicate something, Denis [Hunady] or someone indicates "that just isn't so" . . . .

On June 18, 1997, MassMutual again refused to furnish particulars of its investigation.

After Hunady returned from his investigation in Kentucky, Wolford and King had separate meetings on June 25, 1997 with another Field Practices sub-group, including Hunady. Both were told that 10-12 people interviewed by Hunady had reported they had successfully applied for disability insurance, but did not meet MassMutual's requirements concerning time underground and management duties, and that Wolford had known they were unqualified.

On the basis of Hunady's undocumented reports, MassMutual's executives and Hunady determined that Wolford was guilty of deliberate insurance fraud. Wolford testified he was asked questions about various disability claims, and was told that in six or eight cases, information on the applications did not match the information MassMutual had collected in its investigation. King and Wolford requested the names of the miners MassMutual claimed had made these allegations against Wolford, but MassMutual refused their requests. Hunady admitted he did not give Wolford or King specific names. Following the meetings with MassMutual, King, while riding to the airport, told Wolford, in effect, if the allegations were true there was no chance for Wolford to keep his contract with him.

MassMutual's claims representative testified that nine miners had filed insurance claims. The claims totaled approximately $1,133,000. Associate General Counsel Campbell testified that MassMutual deemed that Wolford had submitted nine false applications. Moreover, MassMutual issued subpoenas for depositions of nine miners, substantially the same as those identified by the claims representative. MassMutual took video depositions from five of the nine; all five confirmed that Wolford had explained the underwriting rules to them, that they qualified, and that the information contained in their applications was accurate. This testimony showed there were no

misrepresentations by Wolford on the applications. MassMutual canceled the remaining four depositions.

All five of the deposed claimant-miners confirmed they were qualified for the disability insurance: Norman testified he was vice-president of production and spent 5-10% of his time underground; Robinson explained he was superintendent and vice-president of production, and made only two to three trips per week underground, each requiring 30-45 minutes; Hunt, supervisor of an above-ground maintenance shop, testified he worked underground approximately eight hours per week; Marcum testified he was a superintendent and that it was largely unnecessary for him to go underground; Fritz confirmed he was a superintendent, had been promoted to vice-president, and that Wolford had explained time underground could not be more than 20%.

Wolford testified that MassMutual's purpose for inducing him to resign his career contracts was to deprive him of commissions he had accumulated through the years, designated by MassMutual as non-vested, renewal and persistency commissions, which were not payable to Wolford if his contract with King were terminated. MassMutual advised Wolford that the value of his non-vested, persistency and renewal commissions as of December 1995, was $746,185. As of July 1997, that figure had increased to approximately $1 Million. Hunady testified he received instructions from MassMutual's executive vice-president to determine Wolford's total commissions, including those in the future, though no reason was given for the investigation.

On June 6, 1997, King told Wolford that unless Wolford could answer the questions raised by MassMutual's investigation, Wolford might face legal actions for fraud which could possibly result in the loss of his insurance and securities licenses, liability for millions of dollars in damages, and possible jail time. On July 8, 1997, Vice-President

Winter sent a final demand that King terminate his career contract with Wolford. On July 13, 1997, King telephoned Wolford and told him "it was coming down." If terminated, Wolford would never have been able to represent another top-tier insurance company. Thus, King suggested Wolford resign from his contract and enter a broker contract with King. In this way, Wolford could continue serving his clients and thereby receive his renewal and persistency commissions. Both Wolford and King testified that King did not expressly inform Wolford of Winter's letter demanding Wolford's termination.

In fact, King testified he had discussions with various executives of MassMutual between July 7 and 13, and, based on what they told him, Wolford would keep his commissions if he resigned and transferred to a broker contract. Broker contracts were entered between King and Wolford on July 14, 1997; and were approved and signed by MassMutual and C.M. Life on August 4, 1997. Then, on September 22, 1997 King terminated the broker contracts per MassMutual's order. King stated he was told by MassMutual's Senior Vice-President Pugh the reason MassMutual wanted to terminate Wolford was the "liability he [Wolford] created for the home office."

Wolford testified that, in his opinion, MassMutual directed King to fire him because MassMutual "wanted my renewals and persistency fees. They wanted my money." MassMutual's senior vice-president admitted to King that the reason MassMutual wanted Wolford's contract terminated was because of the liability created for the company by the miners' claims. Wolford testified it was his belief that MassMutual made a business decision to offset the claims: "I had a lot of renewals and commissions coming to me. It was business decision to take the money."

Post-Trial Motions

Defendant, Massachusetts Mutual Life Insurance Company, pursuant to Rules 50 and 59 of the Federal Rules of

Civil Procedure, has now moved the court to enter judgment as a matter of law, or, in the alternative, for a new trial or remittitur. As grounds for its motion, MassMutual asserts:

1. MassMutual's verdict on the tortious procurement claim bars any claim based on wrongful termination.

2. Wolford's claim for intentional misrepresentation should be dismissed as a matter of law.

3. Wolford suffered no damages as a result of the alleged misrepresentation because his contracts were terminable at will.

4. MassMutual properly terminated Wolford's contract.

5. Wolford's claim for intentional misrepresentation in the termination of his contract is inconsistent wtth Tennessee's "employment at will" doctrine.

6. Wolford's claim for future potential commissions constitutes a claim for interference with future economic advantage, a cause of action which has been expressly rejected by the Tennessee Supreme Court.

7. Wolford's claim for future potential commissions is impermissibly speculative.

8. The court did not clearly instruct the jury that in order to award punitive damages, the jury must also find by clear and convincing evidence that MassMutual acted intentionally, recklessly, maliciously, or fraudulently.

9. The evidence failed to show that MassMutual acted intentionally, recklessly, maliciously, or fraudulently, or was in any way guilty of miscon-

duct which could result in an award of punitive damages.

10. Tom King was not a principal of MassMutual who as a matter of law could subject MassMutual to punitive damages.

11. The verdict was the result of passion, prejudice, and caprice.

12. The verdict was against the great weight of the evidence.

13. The compensatory and punitive damages awarded are excessive and should be reduced or a remittitur should be suggested.

14. The imposition of punitive damages violates the Due Process Clause of the Fifth and Fourteenth Amendments.

15. Wolford's evidence and argument in the bifurcated punitive damage proceeding greatly exceeded the scope of the "intentional misrepresentation" verdict rendered by the jury.

16. The court erred in prohibiting the introduction of the field investigation notes and interviews conducted by MassMutual's investigators.

17. The court erred in allowing Wolford to introduce the substance of field investigation notes and interviews conducted by MassMutual's investigators.

18. The evidence demonstrates that defendants established all elements of their counterclaims by a preponderance of the evidence and accordingly a judgment as to the counterclaims shoud be entered on their behalf.

19. The jury did not find liability for damages on the part of either MML Pension Insurance Company or C.M. Life Insurance Company.

[Docs. 122, 123]

The Jury's Verdict is Not Inconsistent

MassMutual argues that the jury's verdict is inconsistent and should be set aside. I do not find that the jury's verdict was inconsistent. MassMutual was found by the jury to be a party to Wolford's contract with King. Wolford, therefore, did not prevail on his procurement of breach of contract claims. Thus, MassMutual claims Wolford could not, as a matter of law, recover against it on his fraud claim, or on any other tort claim. MassMutual's argument is contrary to the evidence as to whether MassMutual had the right or power to terminate Wolford's contract with King.

The jury determined MassMutual to be a party to Wolford's career contract with King. Thus, there were three parties to that contract: King, Wolford and MassMutual. However, the power of termination did not rest with MassMutual. The career contract identifies only Wolford and King as the parties to the contract and then states that "[t]his contract shall terminate on the date of written notice of termination by either party to the other party . . . ." MassMutual's senior officers, DeLisio and Winter, who are also trained lawyers, testified MassMutual had no power to terminate Wolford's contract. King and Wolford likewise so testified. MassMutual's Vice-President Pugh admitted that MassMutual intended in the future to modify its contract forms to provide MassMutual with the power to terminate the contract "as opposed to going through the general agent." MassMutual's general counsel Campbell testified MassMutual was not even a party to Wolford's contract.

King's general agent contract with MassMutual regarding King's power to employ his own agents states in part:

> Authority – (a) The General Agent may contract with agents for the solicitation of applications for business and with brokers for the submission of applications for business. All contracts made by the General Agent with such persons shall be made upon forms furnished by the Company and executed by the General Agent individually and without the use of his title General Agent. Such contracts and any amendments thereto shall be executed in triplicate and all copies forwarded to the Company for approval and endorsement. The Company shall be immediately notified in writing when any contract is terminated.
>
> (b) The General Agent and agents under contract with him are authorized to solicit and secure applications for business. The General Agent is authorized to accept applications for business from brokers under contract with him. All such applications including all medical examiners' reports shall be forwarded promptly to the Company. The General Agent and agents under contract with him may determine the time, place, and manner of soliciting applications and the persons solicited.

The references to King, as general agent, contracting with agents, makes clear that MassMutual did not regard itself as an equal party with King under the career contract. This is supported by the fact King was required to enter the career and broker contracts "individually rather than as an agent." *See Holt v. American Progressive Life Ins. Co.*, 731 S.W.2d 923, 925 (Tenn.App. 1987); *Hammered v. Herbert Hood Co.*, 221 S.W.2d 98, 102-03 (1949) (holding that despite the existence of an agency relationship, the agent alone is bound on a contract executed in connection with the agency, if the agent so intends);

Menuskin v. Williams, 940 F.Supp. 1199, 1220 n. 16 (E.D. Tenn. 1996) (approving this proposition in dicta). Moreover, if MassMutual possessed a power of termination, it would be reasonable to assume that there would be some reference to MassMutual's power to termination in either contract. The requirement of notification in the event of termination of an agent in King's contract is further support for the proposition that only King could terminate Wolford.

Paragraph 24 of the general agent's contract states: "Nothing in this contract shall be constructed as creating the relationship of employer and employee between the Company and the General Agent or between the Company and persons under contract with the General Agent." As is customary, the general agent and his agents earned commissions on the policies they procured and which were accepted by MassMutual. In this connection, King's contract again bears upon the nature of the relationship between him and Wolford and Wolford and MassMutual. Section 9 provides:

> If the Company, in its discretion, shall refund any premium on any policy issued on an application secured by the General Agent of any person under contract with him, the General Agent shall repay the Company on demand any commission and any fee received on such premium. Any commission and fee allowed under the rules of the Company on any premium not paid to the Company shall be repaid to the Company on demand. Until repaid in full, the amount of such commission and fee shall constitute an obligation of the General Agent to the Company.

In other words, if MassMutual refunded a premium on a policy procured by King's agent, King rather than King's agent, was responsible for the return of the commission. In the event MassMutual terminated King's contract, it

reserved a right to pay commissions to King's agents as follows:

> Upon termination of this contract [King's general agent contract], the Company is authorized to pay any persons under contract with the General Agent any compensation which may be due or thereafter become due in accordance with the terms of the copies of such contracts and the amendments thereto on file at the Home Office of the Company and to offset any compensation so paid against any compensation payable to the General Agent under the provisions of this contract.

The career contract between Wolford and King dovetailed neatly with the contract between King and MassMutual. Paragaph 6(b) of Wolford's career contract with King gives King a right to be repaid on demand any amount he had to pay MassMutual pursuant to his general agent's contract. Section 6(c) of Wolford's career contract provides that a change in King's compensation from MassMutual entailed a "corresponding" change in Wolford's compensation from King. Section 8(a) of the career contract gives King a right to offset against Wolford's compensation "all obligations and liabilities of the Agent to the General Agent on damages, losses, costs, and expenses which the General Agent or the Company may sustain or be liable for by reason of any act or failure on the part of the Agent." Thus, MassMutual had no direct contractual right to recovery against Wolford even if Wolford directly caused it harm.

Section 8(b) of Wolford's career contract with King contains a provision regarding MassMutual's rights if it pays compensation to King's agent after terminating King. Like the General Agent's contract, Section 12 of Wolford's career contract provides that "[n]othing in this contract shall be construed as creating the relationship of em-

ployer and employee between the General Agent and the Agent or between the Company and the Agent."

Wolford's career contract expressly states "[t]he Agent shall act for the General Agent;" it nowhere states the agent shall act for MassMutual. The contract was signed by King, as required by his general agent's contract, in his individual capacity. King's contract with Wolford contains detailed termination provisions which do not include the right of MassMutual to terminate Wolford.

The language of the contracts confirms the parties' interpretation that MassMutual had no power of termination, so long as the general agent's contract with MassMutual was in effect. MassMutual's rights, powers and duties under the career contract are set forth after the principal parties' signatures – explicitly designated in the introductory clause as King and Wolford as follows:

> COMPANY'S AGREEMENT IN CASE OF TERMINATION OF GENERAL AGENT'S CONTRACT
>
> Massachusetts Mutual Life Insurance Company hereby approves this contract and agrees that if it is terminated by reason of the termination of the contract between the General Agent and the Company, the Agent, without further notice, may continue to solicit applications for Business in the Company and submit such applications to the Company under the same terms and conditions and with the same authority and limitations of authority as are set forth in this contract. It is understood and agreed that such relationship shall continue until terminated as provided in this contract or until a contract shall go into effect between the Company and a successor General Agent. The Company further agrees that it will pay to the Agent on behalf of the General Agent any Compensation to which the Agent is entitled under this

contract after the termination of the General Agent's contract.

According to the contracts, as drawn by MassMutual, the only circumstance or condition under which MassMutual had any power or right to terminate Wolford's contract with King is as stated above. In the instant case, there was no such termination of the general agent's contract with MassMutual. Thus, no power or right of termination of Wolford's career contract ever rested with MassMutual. The condition precedent – termination of King's general agent contract with MassMutual – never was met. The caption above MassMutual's signature: "Company's Agreement in Case of Termination of General Agent's Contract," unambiguously and conditionally restricted MassMutual's powers, rights and duties, under Wolford's career contract to circumstances *after termination by MassMutual of King's general agent contract with MassMutual.* No such condition precedent occurred in this case. MassMutual thus had no power or right to terminate Wolford's contract with King. Wolford's contract with King was at-will only as between Wolford and King; not as to defendant.

MassMutual's argument that it had the right to terminate Wolford's contract merely because it signed its approval and agreement to guarantee payment of earned commissions to Wolford in the event MassMutual terminated its general agent contract with King is illogical and not supported by the evidence. All parties to the contract testified MassMutual had no right or power to terminate Wolford's contract with King. The contract itself provides no such power unless specific conditions precedent obtain, i.e., prior termination of King's general agent contract and notice to Wolford. Neither occurred. MassMutual did not present any evidence that it would have terminated King as its general agent. Nor did it present any evidence that in the event of King's termination, it would then exercise its right under the contract and terminate Wolford.

The jury's verdict is not inconsistent. "A verdict is inconsistent when a jury on a single set of facts and circumstances reaches differing conclusions of fact and law." *McCall v. Owens*, 820 S.W.2d 748, 752 (Tenn.App. 1991). Verdicts must be reconciled when possible and harmonized by viewing the case in a way that eliminates inconsistency. *See Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963) (in considering jury's answers to questions in a special verdict, "it is the duty of the courts to harmonize the answers, if it is possible under a fair reading of them. . . . We therefore must attempt to reconcile the jury's finding, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial"); *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"); *Waggoner v. Rosti*, 792 F.2d 595, 596 (6th Cir. 1986); *Milkin v. Smith*, 405 S.W.2d 668, 670 Tenn. App. 1966) (court has duty to try to reconcile incorisistent verdicts). Although the jury found MassMutual was a party to Wolford's career contract with King, MassMutual did not have the right or power to terminate Wolford as indicated by the jury's verdict of intentional misrepresentation on the part of MassMutual in inducing Wolford to resign his career contract with King. I find the jury's verdict is well supported by the evidence on this issue, and it should be affirmed.

At-Will Employment

MassMutual also asserts the jury verdict in its favor on the tortious procurement claim was a case-altering event, definitively terminating Wolford's claim that he was wrongfully deprived of his career contract. The jury's verdict that MassMutual was a party to the contracts left Wolford in an at-will relationship with MassMutual that would have been terminated had Wolford not resigned. Therefore, MassMutual argues, its actions to terminate

its at-will relationship with Wolford cannot constitute a tort.

MassMutual asserts that Tennessee law holds that where a contract is terminable at-will, no misrepresentation as to future employment can be made as a matter of law. *Lawhorn & Assoc., Inc. v. Patriot General Ins. Co.*, 917 F. Supp. 538 (E.D. Tenn. 1996); *Shelby v. Delta Air Lines*, 842 F. Supp. 999, 1015 (M.D. Tenn. 1993); *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 934 (Tenn.App. 1984). Generally, a contract at-will may be terminated "at any time, for good cause, bad cause or no cause at all," without liability to the terminating party. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Harney v. Meadowbrook Nursing Center*, 784 S.W.2d 921, 922 (Tenn. 1990) ("[t]he long standing rule in [Tennessee] is that an employee-at-will may be discharged without breach of contract for good cause, bad cause or no cause at all, without being thereby guilty of legal wrong"); *Whitaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn.App. 1981).

The jury verdict found that MassMutual was a party to Wolford's career contracts. MassMutual contends it had a right to direct their termination without adverse legal consequence or liability. Therefore, terminating Wolford's contracts cannot, as a matter of law, cause any injury or damage to Wolford. Damages cannot be attributed to a legal act which defendant was entitled to take, MassMutual argues.

MassMutual applies the same analysis to the broker contracts. Each contract provided that it terminated upon written notice by one of the parties to the other. Such a provision makes the contract terminable at will, defendant states, with or without cause. The jury found that defendants were parties to the broker contracts. Thus, MassMutual contends, it had the right and power to ter-

minate the broker contracts and cannot be held liable for having properly exercised its legal rights.

Wolford responds that while it is well established in Tennessee law that at-will contracts can be terminated for any reason, no reason, or even a bad reason, that doctrine is wholly inapplicable to the instant case because all the parties interpreted Wolford's contract with King as terminable by Wolford or King, but not by MassMutual. Wolford avers MassMutual's fraud was designed to induce Wolford to resign for the purpose of grabbing Wolford's non-vested renewal commissions as an offset against insurance claims. By its own admissions, MassMutual had no right to terminate Wolford's contract; King refused to do so; therefore the fraudulently induced resignation became MassMutual's method to deprive Wolford of his commissions.

Wolford argues that defendant's reliance on *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999 (M.D. Tenn. 1993) to show that intentional misrepresentation is inconsistent with Tennessee's employment at-will doctrine is misplaced. Wolford states that MassMutual was not his "employer" in the sense at issue in *Shelby* because MassMutual did not have the power to terminate Wolford for any reason. Only King had that power. It is undisputed that MassMutual did not have the right by its own interpretation of Wolford's career contract with King to terminate him. That is the reason MassMutual fraudulently induced Wolford to resign after King refused MassMutual's requests that King terminate Wolford's career contract.

Moreover, Wolford points out that "the interpretation placed upon a contract by the parties thereto, as shown by their acts, will be adopted by the Court, and . . . to this end not only the acts but the declarations of the parties may be considered." *Hamblen v. City of Morristown*, 656 S.W.2d 331, 335 (Tenn. 1983). Agents and employees of

MassMutual presented evidence that MassMutual lacked the authority to terminate Wolford's contract with King. Vice-President DeLisio stated:

> [I]t was not the Committee's job, for instance to terminate a contract. It had no right to do so. . . . So as far as the Committee's authority to terminate a contract between the GA and the agent, it did not have that authority.

Vice-President Winter testified King told him and Field Practices that MassMutual had no authority to terminate the contracts between King and Wolford. King also testified Field Practices did not have such authority and had the ability only to make recommendations. Moreover, King testified MassMutual did not have the authority to terminate, only the General Agent had the authority to terminate the contract with the agent. King added:

> They don't have the power to terminate Leon Wolford. They [MassMutual] don't have a contract with Leon Wolford. They were going to give me instructions to terminate him. They would terminate me, if I didn't terminate him. If they became the G.A. – if they were to terminate me and get me out of the way, they could terminate him. They are the successor G.A.

MassMutual's General Counsel Campbell testified his interpretation was that MassMutual was not even a party to the contracts between Wolford and King. Wolford avers it is not denied that MassMutual interpreted his contract as not being terminable by MassMutual and hence the reason for the fraudulent inducement to resign.

MassMutual has asserted that controlling Tennessee law precludes any compensation for loss of any at-will employment contract, relying upon the cases of *Lawhorn & Assoc. v. Patriot General Ins. Co.*, 917 F.Supp. 538 (1996); *Shelby v. Delta Airlines, Inc.*, 842 F. Supp. 999

(1993), and *Price v. Mercury Supply Inc.*, 682 S.W.2d 924 (Tenn.App. 1984). I find defendant's reliance on these cases is misplaced. Both *Lawhorn* and *Shelby* involve two-party contracts with indefinite terms and present classic employee at-will termination issues. Neither case nor any other authority relied upon by defendant involves a three-party contractual relationship such as the case sub judice.

Wolford relies upon the case of *Berger v. Security Pacific Information Systems Inc.*, 795 P.2d 1380 (Colo.App. 1990) in support of his position that fraud in connection with an at-will contract can be actionable. In *Berger*, a Denver company contacted plaintiff Berger regarding her managing a division of the company that had been performing very poorly. At the time of the contract, Berger was working in a similar capacity with a New Orleans employer. During her interview, an agent of the Denver company misled Berger as to the financial status of the company, the size of its customer base, and as to the prospects for the future. The interviewing agent also concealed the fact that the division might be discontinued in the near future.

Berger decided to take the at-will position in Denver, quit her old job, and moved to Colorado. Seven months later, Berger was terminated because of the company's poor performance. She sued for fraud in the inducement of the employment contract. The defendant contended that the at-will nature of the job precluded a claim for fraud. The court disagreed, stating:

> An employer's right to terminate an at-will employee without cause does not protect the employer from liability for fraud in inducing the employee to accept employment.

Id. at 1384.

The *Berger* case demonstrates how and why actions for fraud can arise in the at-will context. *Berger* has factual

and analytical similarity to the case at bar. Its principles are consistent with the common law in general and with Tennessee's common law in particular. MassMutual prepared Wolford's contract with King and could have granted itself the right to terminate but did not. MassMutual could have terminated King's contract with MassMutual and then as successor General Agent terminated Wolford's contract, but did not. MassMutual's rights and duties under the contract were primarily to approve insurance applications Wolford secured, and pay commissions to Wolford; MassMutual never had any right of termination under the contract, as all parties agreed. MassMutual had to resort to the fraudulent scheme to accomplish its purpose. Under these facts, I find that Wolford's fraud action is not precluded by Tennessee's employment at-will doctrine.

Moreover, even if MassMutual had the right to terminate Wolford's contract, MassMutual could not do so in order to deprive Wolford of his accrued commissions. It is well established that a party's decision to terminate an at-will contract, even when that right clearly exists, cannot be based upon a decision to reap the fruits or profits attributable to the labor of the party being terminated. *W.T. Allen v. Oil Shale Corp.*, 442 F.Supp. 137, 143 (E.D. Tenn. 1977), *aff'd* 570 F.2d 154 (6th Cir. 1978). Even in situations where the right to terminate a contract at will is clearly available, unlike the case sub judice, and even "where a principal has the right to terminate the authority of an agent at any time, such principal may not do so in bad faith as a device to escape the payment of a broker's commission." *Randolph v. New England Life Ins. Co.*, 526 F.2d 1383, 1385 (6th Cir. 1975).

Intentional Misrepresentation

MassMutual further argues that the verdict in plaintiff's favor on intentional misrepresentation is against the weight of the evidence. Proof of fraud or intentional mis-

representation requires proof of (1) a statement to plaintiff of existing material fact; (2) knowledge of the falsity of the fact at the time of the representation; (3) reasonable reliance upon the statement to his detriment; and (4) plaintiff suffered damages as a result. *Oak Ridge Precision Indus. Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.W.2d 25, 29 (Tenn.App. 1992). MassMutual asserts that a promise of future employment pursuant to an at-will contract cannot, as a matter of law, support a claim for fraud because the contract may be terminated at any time. *Price*, 682 S.W.2d at 934.

As to the elements necessary to prove a case of intentional misrepresentation, MassMutual states that no proof was presented of a claimed misrepresentation that Wolford resigned his career contracts based on King's promises that he would retain his commissions if he resigned. MassMutual points to Wolford's testimony that King said "the Home Office was going to terminate my [career] contract" and that "it would be in your best interest if you resign your career contract and take a broker contract because if you get terminated it will be very hard for you to get another AAA carrier like MassMutual for you to work for." MassMutual argues plaintiff gave no testimony that King promised him commissions if he resigned, nor did King testify that he promised Wolford commissions if he resigned.

MassMutual contends there was no proof that King spoke falsely. King believed he spoke truthfully. He wanted to help Wolford, and wanted to get him a broker contract because it benefitted King financially. Moreover, MassMutual avers King made no statement pertaining to a past or existing fact. King testified that he "thought" the broker contracts were a go, but an unexpressed thought cannot support a claim of misrepresentation, defendant asserts. As to the reliance element, MassMutual states that Wolford admitted that he knew his career contracts were terminable at will. His career contracts

spelled out what he would retain post-termination. Defendant avers Wolford was not reasonably giving up anything as a result of King's statements, and cannot claim that his resignation came about in reasonable reliance on King's promise of broker contracts.

MassMutual avers there was no proof of an intent to deceive Wolford. King did not intend to deceive Wolford, – he fervently sought to make his promise of broker contracts come true. Accordingly, King's good intentions, and lack of intent to deceive, must be attributed to MassMutual, defendant argues. The theory of liability against MassMutual is vicarious liability for the intentional tort of an agent; if agent King's actions are imputed to MassMutual to establish liability, King's intentions must also be imputed, and since King's intentions were good ones, not an intent to deceive, this key element has not been established.

Finally, MassMutual avers there is no causal link between anything King said or did and Wolford's loss of his career contracts. As to the termination of the broker contracts, defendant contends that they were also terminable at will. MassMutual argues that the jury verdict on the procurement count established that MassMutual had the right to terminate Wolford's at-will contracts. Therefore, as a matter of law, there can be no monetary liability for their termination. *Lawhorn*, 917 F. Supp. at 543. Wolford was induced by King to resign his at-will career contracts and take at-will broker contracts. Wolford's broker contracts were later terminated, again an act that cannot have adverse consequences as a matter of law. There is no rationale or factual basis for imposing liability for intentional misrepresentation, MassMutual concludes.

Wolford argues that the jury's finding that MassMutual committed fraud and intentional misrepresentation is supported by the record and applicable law. The six ele-

ments of fraud or intentional misrepresentation were satisfied as follows:

(1) MassMutual made false representations: The evidence showed that MassMutual had made false representations directly to Wolford and had also done so through MassMutual's agent King. MassMutual's first misrepresentations began in March 1997, when MassMutual began accusing Wolford of fraud concerning his assistance to Norman with his claim forms when they knew such accusations were false. Thereafter, MassMutual also made false representations to Wolford when MassMutual told Wolford and King that eight to ten successful applications for insurance had been fraudulently submitted by Wolford for unqualified applicants. Finally, after King's discussions with MassMutual's high level executives, Wolford was told that if he resigned he would be awarded a broker contract that would allow him to retain his renewal commissions when this was not true.

(2) MassMutual made false representations of past or present material facts: Wolford contends MassMutual's officers, Winter, Campbell, and DeLisio all testified that the information Wolford supplied for Norman's APS was false and misled MassMutual. MassMutual misrepresented to Wolford and King that Wolford had falsely reported information on insurance applications. MassMutual also misrepresented to Wolford that if he resigned, he would be awarded a broker contract that would allow him to retain his renewal commissions when this was not true. MassMutual made these representations to convince King to terminate Wolford's contract and/or to induce Wolford to resign. The representations were clearly material, Wolford states. Otherwise, King would never have told Wolford his career contract and insurance license were in jeopardy, nor told him he faced criminal prosecution, nor would Wolford have resigned his career contract.

(3) Wolford contends MassMutual knowlingly made false representations: Dr. Vellayan's letter to MassMutual's investigator proves that MassMutual knew that the information Wolford supplied on the Norman APS was correct. Norman told MassMutual's claims representative he was a vice-president, and King told MassMutual that Wolford was complying with his training and with MassMutual's established written requirements for completing forms. MassMutual then falsely accused Wolford of submitting fraudulent applications for non-qualified miners, but MassMutual refused to identify them to Wolford or King.

Additionally, Wolford avers that MassMutual's efforts, through their investigator, to determine the amount of his non-vested future renewal commissions provides circumstantial evidence of MassMutual's motive and intent to strip him of his commissions to offset miners' claims. Hunady testified that Executive Vice-President Davies instructed him to determine the amount of Wolford's future renewal commissions. Moreover, Senior Vice-President Pugh admitted to King that the reason MassMutual wanted Wolford's contract terminated was because of the "liability he (Wolford) created for the Home Office." Wolford testified that "it was a business decision. . . . I had a lot of renewals and commissions coming to me. It was a business decision to take the money." Wolford avers MassMutual wanted his renewal commissions to offset claims by the insured coal miners.

(4) MassMutual intended Wolford to rely on its misrepresentations. Wolford argues that since King would not terminate his contract with him – and more importantly, since MassMutual, King and Wolford all agreed in their interpretation of his contract with King that MassMutual did not have the authority to terminate his contract with King – MassMutual intended that Wolford rely upon their misrepresentations and act upon them by submitting his resignation. Thus, Wolford avers a jury could find he

would not have resigned had he known MassMutual's statements were false.

(5) Wolford was justified in relying upon MassMutual's representations as truthful: Despite King's testimony that Wolford conducted himself at all times in accordance with MassMutual's own training and written rules, Wolford was convinced otherwise by MassMutual, and even testified he thought he had violated MassMutual's rules by completing the Norman APS. Because of MassMutual's misrepresentations, Wolford avers he had an inaccurate but honest belief that he a violated a "rule," when in truth he had actually followed the rules and training he had received. Additionally, despite Wolford's and King's repeated requests before Wolford's resignation, MassMutual would not reveal the names of those miners who, according to MassMutual's investigators, had stated that information Wolford placed on their applications was false. Thus, while Wolford did not believe he had done such, he did not know the basis for MassMutual's representations; he had no way to defend himself or to otherwise prove MassMutual's representations were false; and there were discussions of possible "jail time" and loss of his license. Wolford was, as King testified, "fighting ghosts."

Wolford submits his responsibilities for soliciting applications were limited to recording the information provided him by the applicants during an interview. Each applicant was required to sign his application, after Wolford had recorded the information, and certify it as true and correct. Since Wolford believed he had followed correct procedure, he could not know MassMutual's representations – relative to unspecified miners stating Wolford had recorded information falsely – were themselves false. Wolford contends he was justified in relying upon the truth of MassMutual's representations, including those by MassMutual's agent King who repeated to Wolford what MassMutual's officers told him. Wolford testified he had

been a career agent for MassMutual for over 20 years and had worked for King for years and trusted him. Clearly, a reasonable jury could find he was justified in relying upon what he was being told, Wolford concludes.

(6) MassMutual's fraud damaged Wolford: Damages to Wolford included his loss of non-vested renewal commissions of approximately $1 Million, fringe benefits, office expenses, pension benefits, income from continued sales of MassMutual's counterclaims of $11.4 Million, and potential criminal charges against him. Additionally, MassMutual's agreement that Wolford resign and transfer to a broker contract (which King carried out and MassMutual approved, only to have MassMutual termimte the broker contract), further damaged Wolford. Wolford states he was stripped of all non-vested renewal and persistency commissions, pension benefits, office override, fringe benefits, and the right to maintain his established block of business as MassMutual's representative. Wolford avers MassMutual's termination of the broker contract was deceptive, but even if he had not been granted a broker contract, severe damage to him had already been caused by MassMutual's fraudulent inducement to resign from his career contract.

The jury's verdict should be approved when it is one which could reasonably have been reached. *TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981). When the jury's verdict is one which is against the weight of the evidence or seriously erroneous it should be overturned as being against the weight of the evidence. *Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir. 1996). The trial court should deny a motion for new trial when the verdict is one that reasonably could be reached, regardless of whether the trial court might have reached a different conclusion were he the trier of fact. *Powers v. Bayliner Marine Corp.*, 83 F.3d 789 (6th Cir. 1996). The trial court may not set aside a verdict and grant a new trial because it could have drawn different inferences or

conclusions, or because it feels another result would be more reasonable. *Hinkle v. Waddell*, 945 F.2d 404, 1991 WL 191546 (6th Cir. 1991) (unpublished case).

The undersigned finds there is ample evidence from which the jury could find that Wolford's resignation from his career contract with King was induced by MassMutual's intentional misrepresentations. Wolford produced evidence that MassMutual's motivation to capture his commissions resulted from what MassMutual perceived as a "flurry of claims" received in 1996 which arose from applications submitted by Wolford. MassMutual wanted to retain Wolford's non-vested renewal commissions of approximately $1 Million to offset the claims. Evidence was presented that MassMutual used Norman's APS form as its initial fraudulent pretext for requesting King to terminate Wolford. MassMutual claimed Wolford supplied false and misleading information on the APS form and that MassMutual's rules prohibited Wolford from completing such forms. Both of MassMutual's assertions were rejected by the jury.

King informed Wolford of MassMutual's assertions but refused to terminate Wolford's contract. Wolford and King submitted information to MassMutual to show that the information Wolford had supplied was accurate and in compliance with Norman's request, and that Wolford had been trained to supply such information when a claim form was incomplete. Moreover, King told MassMutual's officers that its own established rules and procedures required an agent to do so. Evidence was also presented that MassMutual had received a written and signed statement from Norman's physician that the information Wolford had added to the claim form was correct.

Based on the evidence, the jury could reasonably find that since MassMutual could not convince King to terminate his contract with Wolford using the Norman APS issue, it attempted to induce King to terminate Wolford's

contract by claiming Wolford had submitted false and misleading applications for miners. Wolford and King repeatedly requested the names of these applicants, but MassMutual refused to provide them. Wolford told MassMutual and King he did not believe he had done such, but without specific names he was in effect defending against "ghosts." Wolford produced evidence that he submitted applications with accurate information and that those applicants did in fact meet MassMutual's underwriting rules.

Moreover, Wolford presented evidence that he was advised by King he should nevertheless resign from his career contract to avoid being terminated and thereby face loss of his securities license, blacklisting in the industry, and potential prosecution by MassMutual. King also testified he had obtained from MassMutual's executives, prior to Wolford's resignation, assurances that Wolford would receive his renewal commissions after his resignation. Wolford also presented evidence that he agreed to resign based on those assurances and the further promise of a broker's contract such that he could continue to service his existing client base.

MassMutual claims Wolford was not damaged by its alleged misrepresentations because under the career contract, Wolford's renewal commissions were non-vested for the policy renewal years 6-10. But King testified he was not aware, until the Wolford case, that long-term agents could have non-vested commissions. King stated he reviewed the career contract and commission schedules before Wolford resigned, could not understand them, and asked Burvin Pugh about them. King also testified he did not receive the vested/non-vested schedule pertaining to Wolford "until the deal was over."

When King received the document as to non-vested commissions he called Burvin Pugh and said "this was not supposed to happen" when Wolford resigned his career

contract. "Burv communicated he thought the same." In fact, Pugh told King the reason for the anomalous result was not due to the career contract language and Wolford's resignation and transfer to a broker contract, but rather Pugh stated it was because of the claims MassMutual had received and did not want to pay. Thus by inducing his resignation, MassMutual could capture Wolford's commissions to set-off against the insurance claims. As King put it: "I asked the question, why are they not going to release the renewal streams and so forth. . . . The answer given to me was 'a large reason is the liability he created for the Home Office.'"

MassMutual through King represented to Wolford, before he resigned, he would keep his non-vested renewals and he would receive a broker contract. Wolford resigned relying on these representations, but they turned out to be false. MassMutual then reneged on its deal. Wolford relied on King and stated that "he trusted King" and relied on King as his boss, MassMutual's General Agent, and in effect saw King as MassMutual concerning the assurances about his renewal commissions.

After construing the evidence most strongly in favor of the non-movant and discarding all countervailing evidence, I find that reasonable minds could not differ as to the conclusions to be drawn from the evidence, and the jury correctly found that Wolford's resignation from his career contract with King was induced by MassMutual's intentional misrepresentations. Tennessee courts have long recognized that fraud is often difficult to prove, that defrauders do not normally leave exquisite paper trails or take eyewitnesses with them; thus fraud may be properly proved by circumstantial evidence. *Edwards v. Travelers Insurance of Hartford, Conn.*, 563 F.2d 107, 113 (6th Cir. 1977) (citations omitted).

Field Investigation Notes

MassMutual also asserts that the court erred in excluding evidence establishing the factual basis upon which the MassMutual Field Practices Committee reached its conclusions. On May 8, during Ben Joiner's testimony, the court ruled that the MassMutual investigator's notes were inadmissible, citing *EEOC v. Ford Motor Co.*, 98 F.3d 1341, 1996 WL 557800 (6th Cir. 1996) (unpublished case). During the direct examination of defendants' witness, Denis Hunady, the court also excluded a memo dated May 21, 1997 to Field Practices, which summarized the evidence gathered during the investigation. Hunady testified that the memo summarized discrepancies he found between information on miner's applications for insurance and the facts as reported during interviews.

MassMutual argues that the memo and other investigatory materials in the Hunady file were admissible to show the factual predicate for the Field Practices decisions, citing the case of *Bush v. Dictaphone Corp.*, 161 F.3d 363 (6th Cir. 1998). In *Dictaphone*, defendant states the Sixth Circuit affirmed the district court's admission of statements of what the corporate decision-maker had been told by plaintiff's unidentified co-workers, finding that the statements were "admissible for the limited purpose of considering the grounds upon which the declarants based their decision with regard to the employment status of the plaintiff." *Id.* at 367. The statements were not hearsay because they were not offered to show whether plaintiff was in fact "abusive or unstable," but rather to show the basis for the defendant's decision. *Id.* at 366-67. In accordance with *Dictaphone*, MassMutual contends that all material reviewed by Field Practices as the factual basis for its decisions should have been admitted.

Had the court permitted the full use of these investigatory materials, Joiner and Hunady could have testified fully about information obtained during the course of the

investigation and presented to Field Practices. Committee members Winter, Campbell, Gray and DeLisio could have testified as to their evaluations of the reports they received, and provided specific details as to the reasons underlying the directions to terminate Wolford. MassMutual argues it was prejudiced by the exclusion of this evidence.

Wolford responds that MassMutual may not avoid application of the hearsay rule by claiming the field investigation notes were offered to "demonstrate the nature of the information before Field Practices" and therefore are not offered for the truth of the matters therein. Wolford asserts that notes of the interviews would not be relevant to prove either MassMutual's counterclaims, or to defend against Wolford's claims of fraud unless they were offered for the truth of the matters asserted, and therefore were properly excluded under Rules 401 and 402, Federal Rules of Evidence. Further, at trial, MassMutual actually offered the notes for the truth of their assertions and claimed that the compound hearsay evidence of MassMutual's investigators' notes from interviews of insured miners comprised business records and contained present sense impressions.

Wolford argues MassMutual's reliance on *Bush v. Dictaphone* is misplaced. In *Dictaphone*, the statements were made by corporate decisionmakers who had been told a discharged employee was abusive. Dictaphone offered the statements to prove it had a reasonable basis to believe the statements to be true and not for their truth. In the instant case, however, MassMutual sought to prove the truth of the matters, i.e., that Norman was not a supervisor and was not disabled. Whether offered in defense of Wolford's claims against MassMutual or in support of MassMutual's counterclaims against Wolford, MassMutual was required to show the matters asserted were true, otherwise they have no relevance.

Wolford points out that MassMutual subpoenaed for evidentiary depositions the very declarants MassMutual interviewed. All those whom MassMutual actually deposed confirmed Wolford performed his duties as required. After hearing testimony from the first five deponents, MassMutual canceled its other scheduled depositions. Thus, Wolford states MassMutual had available the actual declarants who either failed to support MassMutual's claims or were released from subpoena by MassMutual.

Moreover, Wolford asserts MassMutual could have no reasonable basis to believe there were intentional misrepresentations about the Norman APS after (1) MassMutual's own claims representative interviewed Norman, (2) the personnel manager at Norman's mine interviewed Norman, (3) King and Wolford both told MassMutual that Wolford was following MassMutual's own written instructions, and (4) Dr. Vellayan confirmed the information Wolford added to the claim form was correct. Rather than abandon its plan to have King terminate Wolford, which MassMutual initially had based on the Norma APS, MassMutual began preparing for litigation and sent out its investigator to find a basis to support Wolford's termination. MassMutual directed the interviews, and even accused Wolford of fraud and completed official fraud reports for the State of Kentucky. Vice-President Foresi confessed to another executive, Matt Winter, the decision to insure miners was a mistake.

In *EEOC v. Ford Motor Co.*, 98 F.3d 1341, 1996 WL 557800 (6th Cir. 1996) (unpublished case), the EEOC sued Ford under Title VII for alleged racial discrimination against a Ford employee. The EEOC wanted to introduce its "cause determination" (administrative investigation). The district court excluded the cause determination. The Sixth Circuit held the district court did not err in denying the admission of the EEOC determination into evidence. *Id.* at *11.

> Moreover, an EEOC cause determination carries an evidentiary value of practically zero. . . . Generally, the only plausible value of an EEOC cause determination would be that it presents the evidence of discrimination that the EEOC considered. Presumably, much of that same evidence could be adduced at trial, and therefore the admission of the EEOC cause determination referencing it would be redundant. As for any evidence contained in an EEOC cause determination that is properly excluded at trial, an attempt by the EEOC to admit those parts of the EEOC cause determination becomes a not-too-subtle attempt to end-run the Federal Rules of Evidence.

Id. at *10.

I find the reasoning in *EEOC v. Ford* applicable to the instant case. The investigator's field notes present evidence which MassMutual claims led it to try to persuade King to terminate Wolford. These notes were prepared by MassMutual, maintained by MassMutual; and their reliability was seriously undermined by the differences between assertions made in the notes and the sworn deposition testimony of the same witnesses. The evidence could have been adduced at trial, but MassMutual never attempted to do so, as it canceled its own depositions of the remaining witnesses. Indeed, much of it was contradicted by MassMutual's own witnesses' videotape deposition testimony of Robinson, Hunt, Marcum and Fritz, and also by Dr. Vellayan's deposition and his letter to Hunady. MassMutual's attempt to introduce the notes is, in *EEOC*'s words, "a not-too-subtle attempt to end-run the Federal Rules of Evidence." *EEOC* quotes other language which is appropriate to this issue:

> Credibility of witnesses will play a major role in resolving the conflicting positions of the parties here; justice requires that the testimony of the

> witnesses be given in open court, under oath, and subject to cross-examination. . . . The credibility of witnesses has historically been the sole function of the fact finder. . . . In addition to its very questionable probative value, EEOC reports may be prejudicial, irrelevant, and unreliable. . . . It is undisputed that the EEOC report is merely a cumulation of hearsay. . . . Our analysis leads to the conclusion that the exclusion of an EEOC cause determination does not "deprive" a Title VII plaintiff in the admission of any evidence that the plaintiff is entitled to introduce. The plaintiff remains able to seek the live testimony of witnesses and the inclusion of any documents that should be admitted under the Federal Rules of Evidence. Plaintiff is not entitled to have admitted evidence that is properly excluded under the Federal Rules of Evidence.

Id. at *11-12.

The unreliability and self-servingness of the field notes sufficiently bring them within the type of evidence *EEOC* excludes, without any examination of hearsay exceptions being necessary. Since MassMutual refused to divulge to Wolford the names of those interviewed by its investigators, Wolford could conduct no interviews or discovery. Thus, the danger of unfair prejudice to Wolford or misleading the jury permitted exclusion of the interview evidence under Rule 403, Federal Rules of Evidence. Trial testimony of some of the interviewees was introduced by MassMutual and others were available, but MassMutual canceled its own depositions.

Moreover, due to their untrustworthiness, all field investigation notes made after March 18, 1997 by MassMutual's investigators were properly excluded at trial as hearsay and/or compound hearsay, and none fell within the business records exception relied upon by Mass-

Mutual. On March 31, 1997, MassMutual's vice-president wrote his superior: "[W]hen more and more of these decisions are ending up in contract termination, I think we are setting ourselves up for some serious legal actions either now or in the future." King wrote MassMutual on April 3, 1997 that Wolford could "afford excellent legal representation." MassMutual – alerted that termination of Wolford's contract would likely result in litigation – was preparing for litigation.

Entries made in reports prepared primarily for purposes of litigation and not for systematic conduct of business are properly excluded. *Palmer v. Hoffman*, 318 U.S. 109 (1943). The hearsay exception for business records will not be allowed when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *See Lloyd v. Professional Realty Services, Inc.*, 734 F.2d 1428 (11th Cir. 1984). Additionally, there was no business duty on the part of those being interviewed by MassMutual's investigators to report the requested information. *See e.g., City of Cleveland v. Cleveland Elec.*, 538 F. Supp. 1257 (1980), *aff'd* 734 F.2d 1150 (6th Cir. 1981).

The notes also are shown to be untrustworthy by testimony from MassMutual's witnesses. First, MassMutual's associate general counsel testified that information Wolford added to the Norman APS was incorrect, whereas Dr. Vellayan testified to the contrary by deposition, and also stated to the contrary by letter. Second, MassMutual claimed that Wolford violated certain rules concerning the securing of insurance applications. The field investigation notes from Hunady and Joiner reported several such violations. MassMutual served depositions notices on nine applicants. The first five failed to corroborate the statements attributed to them by MassMutual's investigators, whereupon MassMutual canceled the remaining four scheduled depositions. Thus, due to untrustworthiness, I find no field investigator notes prepared after March 18,

1997 fall within the business records exception, Rule 803(6), Federal Rules of Evidence.

Neither the present sense impression exception nor double hearsay exception applies. Rule 803(1), Federal Rules of evidence requires a proffered statement be one "describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter." In each instance, when Hunady purports to relate information supplied by an interviewee, the interviewee's statements pertain to conversations he allegedly had with Wolford *months or years earlier*.

For example, interviewee Hurley stated he had been out of work since January 1997. He had become insured by MassMutual prior to that time. Hunady interviewed him the week of May 12-16, 1997. Hunady's notes state: "Hurley stated that Leon Wolford was fully aware of what his [Hurley's] duties consisted of and of the amount of time that he spent underground at the time the application was taken out." Hurley is not recounting a present sense impression of his own, since his application process with Wolford occurred many months prior to Hunady's interviewing Hurley. In the case of Curtis Francis, the application for insurance was submitted in the late 1980's, some 11 years before the interview and 5-6 years before the underwriting rule was adopted. Since the events the declarants related to Hunady occurred months or in most cases years earlier, Hunady's notes of declarants' remembrances cannot contain declarants' present sense impressions and do not fall within the exception of Rule 803(1), Federal Rules of Evidence.

As discussed above, Hunady's notes do not qualify for the business records exception, since they are untrustworthy and were prepared in anticipation of litigation. Nor were the declarants' statements to Hunady the declarants' present sense impressions. Since neither hearsay

statement is an exception, the double hearsay exception of Rule 805, Federal Rules of Evidence, is not met.

Finally, as previously noted, MassMutual issued and served notices of nine depositions for nine miners for whom MassMutual claimed Wolford committed fraud in submitting their applications for insurance by misrepresenting their job titles and the time spent underground. However, after the first five testified to the contrary, MassMutual canceled the remaining four depositions. MassMutual could have obtained testimony from those witnesses by bringing them to court but chose not to do so. Rather, MassMutual wanted to introduce before the jury its version of the facts. This was a hotly contested case, and the contention by MassMutual that the notes were being offered for reasons other than for the truth of the matters asserted therein was and is rejected by the court. It was the determination of the undersigned at trial that the investigators' field notes were inadmissible, and it is the undersigned's opinion now that this evidence was correctly excluded at trial.

Jury Instructions Concerning Fraud

MassMutual's amended motion claims that MassMutual's misrepresentations, as stated in the court's charge to the jury, were not as to present or past material facts, but this is inaccurate. MassMutual's selection of only a portion of the jury charge distorts the court's instructions. The court's pretrial order [Doc. 101] states that Wolford claims MassMutual, through the conduct of King, fraudulently induced him to resign his career contract. Wolford claimed King made false representations to him that if he resigned, he would receive a broker contract and he would continue to receive his commissions. Wolford also claims his resignation was not voluntary and was made under the threat of termination. The court instructed the jury, prior to the presentation of any evidence, as follows:

> Plaintiff also sues defendants, asserting that through their agent, Tom King, defendants committed a fraud upon him by encouraging him to resign his position as a career agent with defendants upon the expectance that he would receive brokers contracts with defendants.

Prior to the evidence, the court also instructed the jury as to the elements Wolford needed to prove for the tort of intentional misrepresentation. At the conclusion of the evidence the court again instructed the jury as to the elements of intentional misrepresentation, and added:

> If you find from the evidence that Tom King, as agent for defendants, knowingly made a false representation to plaintiff to induce him to resign his career contracts with King, that plaintiff reasonably relied on the representation and as a result sustained damages, then you will find for plaintiff on this issue. If plaintiff has failed to prove any of the required elements, then your finding will be for defendants on this issue.

The Special Verdict Form specifically states in Question 5: "Do you find that Mr. Wolford has shown . . . that Massachusetts Mutual made intentional misrepresentations . . ."

MassMutual's objection to these instructions ignores the totality of the court's jury instructions and seeks to limit the jury's application of the law to only the broker contract. The evidence established that MassMutual's fraudulent misrepresentations were far more extensive. They began as early as November 1996, and continued through July 1997, long before the subject of the broker contract ever arose. Wolford testified he would never have considered resigning from his career contract but for MassMutual's misrepresentations to convince or force King to terminate him. The evidence established that King's representations to Wolford that if he resigned he

would receive the broker contract and he would continue to receive his commissions were made in the July 13 telephone conversation between King and Wolford. King's July 16 letter confirms that discussion. For example, King wrote:

> As we discussed – I will provide you with all the service information you need to continue servicing your clients, just as you have in the past. Also, as we discussed . . . since you are vested your renewals will continue.

This letter thus provided evidence that all of King's statements to Wolford resulted from King's previous discussions and correspondence with MassMutual's executives.

The evidence further established that Wolford was induced to resign by MassMutual's misrepresentations of past and present facts (the Norman claim, alleged misstatements in applications submitted by Wolford, issuance of the broker contract, and the retention of the renewals). MassMutual wielded these past-fact misrepresentations to convince King to terminate Wolford's contract and/or to induce Wolford to resign his career contract. When King refused to terminate Wolford's contract, MassMutual made additional present-fact misrepresentations regarding the issuance of the broker contract and retention of commissions. Wolford faced a Hobson's choice, resign or have King terminate his career contract. Resignation and acceptance of the broker contract would allow Wolford to avoid the consequences of termination (never again being able to work for a top tier company, loss of his securities and insurance licenses, possible criminal prosecution, and loss of his renewal commissions). Wolford resigned and accepted the broker contract which MassMutual terminated after Wolford, King, and MassMutual all three had signed. It was the determination of the undersigned at trial that the jury was correctly

charged, and it is the undersigned's opinion now that the jury charge was correct.

The Compensatory Damages Verdict

Without waiving its argument that Tennessee law prohibits any cause of action based on oral statements/misrepresentations in terminating or inducing the termination of an at-will contract, MassMutual contends that even if some damages were recoverable, they must be specifically to compensate for the injury caused by the detrimental reliance on the misrepresentation. Generally, a plaintiff injured by reliance on a fraudulent misrepresentation is entitled to recover the value of "the pecuniary loss to him of which the misrepresentation is a legal cause, including . . . pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation." *Restatement (Second) of Torts* § 549; *Boling v. Tenn. State Bank*, 890 S.W.2d 32 (Tenn. 1994). However, MassMutual contends, because the action Wolford alleges he was "induced" to take was resignation of an at-will contract which was about to be terminated, no "loss" can be attributed to his reliance on King's statements. Had he not resigned, he would have been terminated without compensation, MassMutual argues.

Alternatively, Wolford could claim as damages the "benefit of the bargain," that is, the value of the promise as made. *Blasingame v. American Materials*, 654 S.W.2d 659, 665 (Tenn. 1983) ("The basic rule prescribing the measure of damages for fraud is that the injured party should be compensated for the actual injuries sustained by placing him or her in the same position that he or she would have occupied had the wrongdoer performed and the fraud not occurred."). Under this theory, MassMutual avers, Wolford could argue that he should recover the value of the broker contracts for some period of time. However, MassMutual contends that an at-will contract is nothing more than a prospective economic advantage,

subject to the continued willingness of the other party to continue the contract, and Tennessee law has rejected interference with prospective economic advantage as a tort. *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997).

In sum, MassMutual argues that the compensatory damages award of $1.9 Million, the value of the loss of the career contracts, is unrelated to any conceivable measure of damages for the intentional misrepresentation and must be set aside, either as a matter of law or because it is overwhelmingly against the weight of the evidence. As an alternative, MassMutual avers the court has the power to reduce the verdict if "the verdict is beyond the range of reasonableness." *Smith v. Shelton*, 569 S.W.2d 421, 427 (Tenn. 1978) (*quoting Stark v. Yost*, 334 S.W.2d 954, 958 (Tenn.App. 1939). MassMutual argues that there is no basis upon which to calculate any amount (other than zero) for the verdict, and the court should therefore reduce the verdict to zero [Doc. 133, 142].

Wolford responds that since he had been a career agent for over twenty years, a jury could reasonably find he more likely than not would have continued but for MassMutual's fraud. Wolford states the evidence presented in support of his claims for compensatory damages included his personal tax returns for 1991-1999, the Significant Benefits Statement prepared by MassMutual for the period ending 1995, the testimony of King, plaintiff, plaintiff's expert, Michael Costello, CPA, and his report and supplemental report. The jury was presented with evidence Wolford suffered the following damages:

(1) lost renewal commissions of approximately $1,000,000;

(2) lost pension benefits of nearly $400,000;

(3) lost annual office expense reimbursement of 35% of his compensation, which totals approximately

$125,000, i.e., $50,000 per year from July 1997-May 2000;

(4) lost fringe benefits of $70,000, i.e., $28,000 x 2-1/2 years; and

(5) lost income between July 1997 and the trial of approximately $399,400)

Thus, Wolford's damages as of the trial date were at least $1,994,000. MassMutual's own documents and special benefits witness, Forni, testified that as of 1995, Wolford's lost commissions and pension benefits alone were in excess of $1.3 Million. King testified that Wolford lost additional renewals for the period between December 1995 and July 1997 of $1 Million. Wolford's expert testified he estimated Wolford's lost income from resignation until expected retirement date was approximately $1.3 Million. Thus, Wolford presented evidence of $3.2 Million total damages. Wolford proved damages of $1.9 Million without taking into account any of his lost income past the trial date [Doc. 145].

The basic rule prescribing the measure of damages for fraud is that the injured party should be compensated for the actual injuries sustained by placing him in the position that he would have been in had the fraud not occurred. *Blasingame v. American Materials, Inc.*, 654 S.W.2d 659, 665 (Tenn. 1983). As correctly noted by plaintiff, under Tennessee law if there is substantial evidence in the record from which reasonable inferences may be drawn, mathematical certainty as to damages is not required. *Cummins v. Broady*, 667 S.W.2d 759, 765 (Tenn.App. 1983); *Acuff Vinsant*, 443 S.W.2d 669, 674 (Tenn.App. 1969). Plaintiff is only required to prove his damages by a preponderance of the evidence, and plaintiff did that in this case.

Accordingly, viewing the evidence in a light most favorable to the non-moving party, defendant's motion for re-

mittitur of the compensatory damages verdict must be **DENIED**. The evidence presented during the course of the trial established that the award of the jury is not beyond the range supportable by the proof introduced at trial or so excessive as to shock the conscience, or the result of a mistake. After reviewing the evidence presented during the course of this trial, it is the determination of the undersized that the evidence preponderates in favor of the jury verdict in this case. The award of the jury appears to be within the range of reasonableness, the amount does not shock the conscience of the court, and, in the opinion of the undersigned, the compensatory award of the jury should neither be set aside nor reduced.

MassMutual has characterized plaintiff's damages as a claim for interference with prospective economic advantage, which defendants aver should be dismissed as a matter of law pursuant to the decision of the Tennessee Supreme Court in *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997). Defendant made this same argument in its motion for summary judgment prior to trial. As stated in the court's memorandum and order denying defendant's motion for summary judgment [Doc. 70], the undersigned does not believe *Nelson* is applicable to the case at bar as the plaintiff d[illegible]llege a claim for interference with prospective economic advantage. Rather, plaintiff alleged and proved his claim for fraud in the inducement of his resignation of his contract of employment with Tom King. As discussed above, Wolford proved damages of $1.9 Million without taking into account any of his lost income past the trial date. I find defendant's argument on this issue without merit.

Thirteenth Juror Rule

MassMutual asks the court to invoke Tennessee's "Thirteenth Juror Rule." Since the weight of the evidence on the preceding issues preponderates in Wolford's favor, a re-weighing by the court can reach only the same conclu-

sions as reached by the jury. In fact, the jury was instructed it had to find fraud by the high standard of clear and convincing evidence, before punitive damages could be assessed. The jury so found. The undersigned is of the opinion that the clear weight of the evidence supports the jury's verdict and award of compensatory damages.

The Punitive Damages Award

The undersigned has previously conducted a review of the punitive damages verdict in this ease in accordance with *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) and other applicable law. In the memorandum and order entered August 1, 2000, I suggested a remittitur of the punitive damages award of $47.3 Million, leaving a punitive damages award of $7.6 Million (four times the compensatory damages award) [Doc. 134]. MassMutual requests a further remittitur of the punitive damages award. Wolford, on the other hand, argues that any remittitur is improper. After careful review of the arguments submitted by the parties, I find that the suggested remittitur is correct for the reasons contained in my memorandum August 1, 2000, which is incorporated herein by reference.

If plaintiff rejects the court's suggestion of remittitur, then the court will conduct a new trial limited to the issue of the amount of punitive damages. The court will inform the jury that the defendant has been found liable for punitive damages, and the parties may then proceed to put on proof relevant to the factors set forth in *Hodges*.

Noerr-Pennington Doctrine

MassMutual asserts the court's ruling admitting its counterclaims into evidence to demonstrate intentional acts of malice against Wolford, was unconstitutional un-

der the *Noerr-Pennington* doctrine.[1] Defendant argues the First Amendment prohibits any assertion of liability for the act of bringing a lawsuit or asserting a claim for relief unless the claim is "objectively baseless" and brought as a sham solely for illegal or abusive purposes. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61-62 (1993).

MassMutual further argues that the court's submission of the counterclaims to the jury and denial of Wolford's Rule 50 motion bars any argument that MassMutual's counterclaims could somehow constitute malicious prosecution let alone fall under the *Noerr-Pennington* exceptions. MassMutual avers the court's decision allowing the counterclaims to be cited as evidence of malice in support of punitive damages was extremely prejudicial. Wolford was allowed to testify that the counterclaims would have destroyed him financially for the rest of his life and implied that they had caused him devastating emotional harm. By allowing the jury to punish MassMutual for bringing claims that are immunized under the First Amendment, the court violated the *Noerr-Pennington* doctrine, MassMutual argues.

The Noerr-Pennington doctrine holds that business interests may combine and lobby to influence the legislative, executive, or judicial branches of government or administrative agencies without violating the antitrust laws, because such activities are protected by the First Amendment right of petition. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Amer. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Under the Noerr-Pennington doctrine, liability may not be assessed under

---

[1] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

§ 1983 or the anti-trust laws except in very limited circumstances, for actions taken when petitioning authorities to take official action, regardless of the motives of the petitioners, even where the petitioning activity has the intent or effect of depriving another person of property interests. *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1071, 1084 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989).

MassMutual attempts to extend the immunity provisions of the Noerr-Pennington doctrine beyond the assertion of claims in an anti-trust action to its assertion of a counterclaim in this case. MassMutual has cited no authority for such an extension of immunity and the court has found none. Accordingly, I find MassMutual's argument that the admission of evidence concerning its counterclaim during the punitive damages hearing violated the Noerr-Pennington Doctrine is without merit.

Moreover, this evidence was only permitted after the jury first found that punitive damages were appropriate in this case, and under *Hodges v. Toof*, 833 S.W.2d 896 (Tenn. 1992), trial courts are instructed to consider, among other factors: (1) the nature and reprehensibility of defendant's wrongdoing, i.e., the impact of defendant's conduct on the plaintiff; (2) defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; and (3) the duration of defendant's misconduct and whether defendant attempted to conceal the conduct. *Id.* at 901-02. The jury should be allowed to consider the impact the prosecution of the counterclaim had on plaintiff. From the paucity and probative value of the evidence presented by MassMutual in support of its counterclaim, the jury could reasonably find MassMutual had a wrongful motive in asserting the counterclaim. It was the determination of the undersigned at trial that evidence of MassMutual's counterclaim was admissible under *Hodges*, and it is the undersigned's opinion now that this evidence was properly admitted at trial.

Motion Pursuant to Rules 58, 59(e) and 60

On June 8, 2000, defendants filed two motions relating to the entry of judgment. The first motion, pursuant to Rules 58, 59(e) and 60, sought correction of the form of judgment, the parties against which it was entered, entry of judgment on the counterclaims, etc. By their supplemental motion filed August 17, 2000 [Doc. 143], defendants state that this motion has been effectively resolved by the court's memorandum and order dated August 1, 2000, and the subsequent amended judgment in a civil case entered August 4, 2000. Accordingly, defendants' motion to correct the form of the judgment [Doc. 123] is **DENIED AS MOOT**.

Motion for New Trial on Defendant's Counterclaims

MassMutual has also moved for a new trial on its counterclaims, arguing that evidence central to the Field Practices' decisions and actions was improperly excluded at trial. Admission of this evidence, MassMutual contends, would show that defendants' counterclaims were well founded. Therefore, a new trial should be awarded on defendants' counterclaims [Doc. 133, 142].

As discussed above, it was the determination of the undersigned that the investigator's field investigation notes were untrustworthy hearsay and therefore inadmissible into evidence. MassMutual could have obtained testimony from the witnesses by bringing them into court but chose not to do so. MassMutual has the burden of proving its counterclaims by a preponderance of the evidence and it failed to do so.

Moreover, MassMutual's evidence did not support its claim of $11.4 Million in damages alleged as a result of Wolford's alleged misrepresentations on applications by coal miners. MassMutual's actuary James Sheehan testified that his estimate for the additional cost from Wolford's block of disability business was $11.4 Million.

However, of the 24 insureds utilized in his calculations, Wolford presented evidence that established 12 of those 24 were non-miners – pharmacists, accountants, lawyers, a retired judge, mining executives, etc. MassMutual failed to present evidence that Wolford made misrepresentations on the insurance applications, and further failed to show that it incurred the claimed losses as a result of insuring coal miners.

Accordingly, MassMutual's motion for new trial on its counterclaims [Docs. 133,142] is **DENIED**.

Conclusion

For the reasons hereinabove set forth, defendant's motions for judgment N.O.V. or in the alternative for new trial or remittitur, as amended [Docs. 118, 122, 143] are **DENIED**. Defendant's motion to amend, correct, and/or vacate judgment [Doc. 123] is **DENIED AS MOOT**. Plaintiff's motion to modify and amend the court's suggestion of remittitur [Doc. 138] is also **DENIED**.

Plaintiff is **DIRECTED** to notify the court within fifteen (15) days from the date of this opinion whether he accepts or rejects the suggestion of remittitur of the punitive damages verdict. If plaintiff rejects the suggestion of remittitur, then the court will conduct a new trial only on the amount of punitive damages as set out above.

IT IS SO ORDERED.

ENTER:

/s/ THOMAS W. PHILLIPS

Thomas W. Phillips
UNITED STATES MAGISTRATE
JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5694 & 02-6336

LEON WOLFORD,
Plaintiff-Appellee,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellant.

[Filed May 20, 2004]

ORDER

BEFORE: SILER, BATCHELDER, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Leonard Green, Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

August 9, 2004

Mr. Cecil W. Laws
239 E. New Street
Kingsport, TN 37660

Re: Leon Wolford
v. Massachusetts Mutual Insurance Co.
Application No. 04A131

Dear Mr. Laws:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 9, 2004 extended the time to and including September 17, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By
/s/ ANN MCCAMEY
Ann McCamey
Case Analyst

[attached notification list omitted]

APPENDIX E

Federal Rule of Civil Procedure 50 provides:

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial; Conditional Rulings. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee

is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(2)

Supreme Court, U.S.
FILED
OCT 20 2004
OFFICE OF THE CLERK

No. 04-376

IN THE

Supreme Court of the United States

LEON WOLFORD,

Petitioner,

v.

MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

BENJAMIN R. CIVILETTI*
NELL B. STRACHAN
MITCHELL Y. MIRVISS
VENABLE LLP
2 Hopkins Plaza
Suite 1800
Baltimore, Maryland 21201
(410) 244-7400

* *Counsel of Record*

Attorneys for Respondent

190468

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Where Petitioner raises no issues of law, no conflict among the Circuits, and no impact beyond the immediate parties, and instead raises only a fact-based question of sufficiency of the evidence, should this Court grant a writ of certiorari to review the Sixth Circuit's routine exercise of its appellate authority under Fed. R. Civ. P. 50 to review a fraud verdict for sufficiency of the evidence?

2. Where Petitioner ignores the fundamental evidentiary failure of his fraud case; provides the Court with an egregiously incomplete and misleading discussion of the complex record below; asserts new fraud theories that were never presented to the jury and which are not supported by sufficient evidence; and fails to advise the Court of numerous other grounds supporting reversal of the jury verdict, should this Court grant a writ of certiorari and/or summarily reverse the Sixth Circuit's unreported decision?

RULE 29.6 CERTIFICATION

Pursuant to Rule 29.6, Respondent Massachusetts Mutual Life Insurance Company ("MassMutual") certifies that it has no parent companies and that no publicly held companies hold 10% or more of any of its stock or otherwise is financially interested in the outcome of the proceeding. MassMutual is a mutual insurance company owned by its policyholders.

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RESPONSE TO STATEMENT OF THE CASE

As Petitioner Leon Wolford's Statement of the Case (Pet. 2-7) distorts the facts and history of this case, Respondent Massachusetts Mutual Life Insurance Company ("MassMutual") sets forth the following response.

A. The Termination Of Petitioner's Agent And Broker Contracts By MassMutual.

Wolford's recitation of the facts fails to describe the actual relationships among himself, MassMutual, and the MassMutual general agent, Tom King. Both Wolford and King had at-will contracts and as such had no contractual power to resist the decisions by MassMutual to sever all contractual relationships with Wolford by directing King to terminate Wolford's career agent and broker's contracts.

These relationships were established in written contracts. MassMutual had entered into an at-will contract with King to serve as its general agent in Eastern Tennessee. (J.A.I. 190-91).[1] King, in turn, had entered into an at-will contract with Wolford, to which MassMutual was a party, to serve as a full time MassMutual "career agent." (J.A.I 194) ("this contract may be terminated at will by the other, with or without cause"). Both contracts were terminable at any time for any reason.

---

1. Two Joint Appendices were presented to the Sixth Circuit, reflecting the fact that MassMutual noted two appeals below that were consolidated for oral argument: "J.A.I" was filed in No. 01-5694, an appeal from the district court's denial of MassMutual's motion for judgment as a matter of law or for new trial, and "J.A.II" was filed in No. 02-6336, an appeal from the district court's denial of MassMutual's motion for new trial based upon newly discovered evidence.

Under Tennessee law, an at-will contract may be terminated at any time for any reason, "for good cause, bad cause or no cause at all," without liability to the terminating party. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Harney v. Meadowbrook Nursing Ctr.*, 784 S.W.2d 921, 922 (Tenn. 1990) ("The long standing rule in [Tennessee] is that an employee-at-will may be discharged without breach of contract for good cause, bad cause or no cause at all, without being thereby guilty of legal wrong."). Tennessee law also holds that a party to an at-will contract cannot be held liable in contract or tort for termination of the at-will relationship. *See Lawhorn & Assocs., Inc. v. Patriot Gen. Ins. Co.*, 917 F. Supp. 538, 543 (E.D. Tenn. 1996); *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999, 1015-16 (M.D. Tenn. 1993); *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 934 (Tenn. Ct. App. 1984).

The evidence was uncontroverted that, under this arrangement, while MassMutual was not the direct employer of Wolford and thus arguably lacked direct authority to terminate him, MassMutual still had control over him and had unquestioned power to cause his termination by directing King to do so. (J.A.I 1062-63, 1304-05). King himself acknowledged that he was obligated to implement MassMutual's directives and that any failure to follow directions would jeopardize his own status: "They would terminate me, if I didn't terminate him." (J.A.I 1090). Under the contracts, once MassMutual terminated King for refusing to terminate Wolford, it succeeded King as general agent and could terminate Wolford directly. *Id.*; J.A.I 195. King so testified, J.A.I 1090, and Wolford did not dispute this power.

MassMutual therefore had no need to engage in any "fraud" to trick King into inducing Wolford to resign in lieu

of termination. MassMutual had the power and ability to cause Wolford's termination for any reason or no reason. Nevertheless, when MassMutual was alerted to issues concerning Wolford's business practices, it chose to investigate and consider the allegations carefully, not because it lacked the power to cut Wolford loose, but as a sound business step to make sure that its decision was correct. Only by misrepresenting this history and miscasting MassMutual's legitimate effort to investigate him as a "fraud" does Wolford now claim error by the Sixth Circuit.

Wolford had been one of the top "producers" for the company, with particular success in marketing to coal miners a program of life, disability, and health insurance that he had devised as an alternative to worker's compensation insurance for the coal industry. (J.A.I. 896, 901, 905, 908, 1142). As Wolford's general agent, King also prospered from this business. (J.A.I 1024). The program had only limited application, as controlling state law restricted the right to opt out of worker's compensation to company officers. (J.A.I 918). Additionally, given coal miners' high rate of on-the-job injuries, MassMutual had underwriting requirements that prohibited issuing policies to a miner who worked more than six to eight hours per week underground. (J.A.I 1284).

In 1996, alerted by written complaints from a MassMutual agent, MassMutual began an investigation into whether Wolford had misrepresented coal miners' job titles or duties in disability insurance applications in order to obtain MassMutual underwriting approval. (J.A.I 410-14). At about the same time, MassMutual's disability claims unit had received an application for benefits for Grant Norman, a coal miner customer of Wolford's, which included a doctor's Attending Physician's Statement ("APS") that was completed

in two different handwritings. (J.A.I 417-18, 1268). Wolford ultimately *admitted* to MassMutual and at trial that he had added substantial information in his handwriting after the doctor had signed the form, without attribution, in violation of company rules. (J.A.I 983, 990). His explanation, that his additions reflected the doctor's views, did not mitigate the violation, as the rules prohibited alteration without attribution. *Id.*; J.A.I 1004-05.

MassMutual submitted these allegations to its Field Practices Review Committee, a high level committee comprised of representatives of different corporate divisions. The committee had authority to direct the general agent to terminate a career agent. (J.A.I 768-70, 1305).

After investigating the APS alteration, the committee chair wrote King on March 18, 1997 with directions to terminate Wolford's career agent contract, citing the APS alteration as cause for the termination. (J.A.I 439). The letter explicitly stated that Wolford could not receive a broker contract as an alternative. *Id.* Instead of following directions, King protested and sought further investigation. (J.A.I 1255-56). The Committee accommodated his request and directed its investigator to conduct additional interviews of coal miners and of Norman's physician. (J.A.I 1256-57). The investigator, Denis Hunady, MassMutual's most senior field investigator (lauded even by King as "one of the very best investigators in the industry" and a "human lie detector" (J.A.I 503)), reported to Field Practices that several miners had told him and a private firm hired to assist in the investigation that they had spent more than 50% of their time underground, that Wolford had known that fact, and that Wolford had used phony job titles in an apparent effort to circumvent the restriction of waiver of workers compensation

coverage to company officers. (J.A.I 678-81 [admitted for ID only], 1234-35, 1259-61). These statements, if true, would prove that Wolford knowingly submitted false and fraudulent applications to MassMutual.

Petitioner's statement to this Court – that the investigation was fruitless, that none of the miners testified to any wrongdoing by him, and that MassMutual cancelled their *de bene esse* depositions because of the lack of helpful testimony – is flat-out wrong. Three of the five miners testified that: (1) their insurance applications as prepared by Wolford were significantly inaccurate as to the nature of their job duties, their time underground, or their medical history; and (2) they had provided the correct information to Wolford. (J.A.I 1548 [Hunt] ("the information definitely was not accurate"), 1512 [Marcum] (testifying that the application contained inaccurate medical history); 1530-31 [Fritz] (affirming that, when Wolford was filling out the application, miner Fritz had warned, "That's not right, you know"), J.A.I 1536 (affirming that Fritz had spent "60 to 65" percent of his time underground)).

Hunady submitted a written report to the Field Practices committee summarizing evidence of misconduct by Wolford concerning six or more miners. At trial, Wolford successfully objected to this report and related testimony, claiming that it was hearsay, even though MassMutual had offered it as the basis for the decision to terminate Wolford and even though Wolford was allowed to introduce exculpatory evidence from that same investigation. His contention here, that the investigation was a "fraud," is absurd, as that charge rests upon his effort to keep the report from the jury – an egregious error compounded by the court's inexplicable decision allowing *him* to introduce similar evidence from the investigation.

The Hunady report found that Wolford had known of information that contradicted applications he had prepared for miners Francis (who reported to Hunady that he spent 80-85% of time underground); Hurley (75%); Fritz (60-65%; Wolford created misleading job title of VP for production); Anderson (50%); and Hunt (contrary to the "desk job" described in his application, his actual job was "hard physical work" maintaining mine equipment). (J.A.I 678-81). *See also* J.A.I 1259-61 (affirming findings for Hurley, Fritz and Anderson). Two miners (Fritz, Francis) confirmed these facts in written statements. (J.A.I 678-81). Hunady's proffered file included reports by an outside investigatory firm retained by MassMutual that not only were consistent with Hunady's findings but had also found another miner, Maggard, who worked 50-60% underground, contrary to his Wolford-prepared application claiming minimal time spent underground. (J.A.I 726-35, 729).

Hunady's findings were alarming to Field Practices. Misrepresentation of time underground meant that policies had been issued in violation of underwriting guidelines. Misrepresentation of job title raised the specter of improperly obtained waivers of mandatory workers compensation insurance. Although King and Wolford flew to Springfield and met with the committee to present their side of the facts (J.A.I 1030-34), Field Practices again concluded that it lacked confidence in Wolford and recommended that the company sever all relationships. (J.A.I 768-70).

On July 8 the committee again directed King, in writing, to terminate Wolford's contract. (J.A.I 463). MassMutual declined to provide King with details or grounds for its decision and instead said simply that it had "lost confidence" in Wolford. (J.A.I 463). King pressed for details but was told

only of serious concerns regarding the miner applications and the APS. (J.A.I 464). At trial, King affirmed that MassMutual consistently refused to provide him with details of the allegations against Wolford. (J.A.I 1030).

King, acting on his own, again avoided terminating Wolford. Instead of firing Wolford as directed, he allegedly called Wolford at home on Sunday, July 13, and told Wolford, contrary to MassMutual's instructions, that he expected that a direction would be "coming down" in the near future. (J.A.I 1047). King and Wolford both testified that King advised Wolford to avoid termination by resigning, thereby preserving Wolford's ability to enter into a similar agency contract with another AAA-rated life insurance company. (J.A.I 944-45; 1048). They also testified that King recommended that Wolford take a broker contract as an alternative to the career contract (notwithstanding the March 1997 letter advising King that MassMutual would not accept that alternative). *Id.* At trial, King claimed without substantiation to have telephoned three MassMutual executives soliciting support for his idea to switch Wolford to a broker's contract. (J.A.I 1043).

Wolford knew that he would be terminated if he did not resign. (J.A.I 944-45). He testified that he wrote out a short note resigning as a career agent (J.A.I 465), and the next day, July 14, signed an at-will MassMutual broker contract with King (J.A.I 466-67). According to his and King's testimony, two days later, on July 16, King wrote to Wolford advising him for the first time that MassMutual had directed King to terminate Wolford and that the March termination letter had warned "that [Wolford] would not be eligible for a broker's contract." (J.A.I 468-69). King stated in the latter that "I have not determined just how to go about pursuing

the broker's contract yet, but I will do so" and opined that "since you are vested your renewals [certain commissions] will continue" (a view which, it turned out, was mistaken) and that Wolford would not be hurt by aligning with another company. (J.A.I 468). Wolford did not protest or respond to this letter. Instead, he promptly signed a career agent contract with AAA-rated National Life of Vermont (J.A.I 531-63), with which he continued to sell insurance at standard commission rates.

MassMutual did not accept Wolford's switch to a broker contract. (J.A.I 470). Despite further efforts by King, on September 4 the home office wrote King and insisted that he terminate the broker contract. (J.A.I 473). This time, on September 22, 1997, King complied, finally ending the Wolford-MassMutual relationships. (J.A.I 474).

Wolford's fraud claim rests upon these allegations.

B. The Proceedings Below And Related Proceedings.

1. The Complaint And The Trial Evidence.

A few months after his termination, Wolford sued MassMutual for statutory and common law interference with his contractual relationship with King and for "fraudulently inducing the Plaintiff to resign his Career Contracts" through "the deception involving the assurance 'since you are vested your renewals will continue[.]'" (J.A.I 30). Thus, Wolford's fraud claim rested specifically on the statement by King in his July 16 letter, which, according to King and Wolford, was sent several days *after* Wolford had purportedly resigned on July 13 and signed broker's contracts on July 14, that Wolford could retain his vested commissions if he resigned

and entered the broker's contracts. That King made these alleged statements contrary to express directions and that King told Wolford that: (1) MassMutual previously had rejected the broker's contract option; and (2) that King had not yet figured out how to work around that obstacle (J.A.I 468) apparently was of no moment to Wolford.

The complaint did *not* allege the theory of fraud raised here, *i.e.*, that the Field Practices investigation was a sham intended to trick King and Wolford, through trumped-up allegations, into choosing resignation to avoid termination. *See* J.A.I 30. Wolford never amended the allegation, and the case proceeded to trial based on this "promise of commissions" theory set forth in the complaint, not the "fraudulent investigation" theory raised here.

At trial, which focused on the tortious interference claim, Wolford adduced no evidence of the dubious fraud theory. Previously, at deposition, Wolford had admitted that no specific promise was ever made by King that he would keep his commissions if he resigned and accepted broker's contracts: "Q: When would the conversation concerning vested commissions have occurred or was there a conversation? A: I don't believe that we actually had a specific discussion on that." (J.A.II 66-67). The trial testimony was no better. Wolford did *not* testify that commissions were discussed on July 13 or that he was induced to resign by a promise of commissions. Instead, he testified only that he was encouraged to resign and take a broker's contract in order to avoid termination and preserve his reputation and employability. (J.A.I 944-45). King likewise never testified that he promised Wolford commissions if he resigned. *See* J.A.I 1048. To the contrary, King said he didn't know if the issue had been discussed: "Q: Did you and Mr. Wolford ever talk about his commissions in the July 13th, 1997 telephone conversation? A: I don't know." (J.A.I 1099).

This fundamental lack of proof of a misrepresentation was compounded by an even greater flaw in Wolford's claim: the lack of any injury caused by the purported inducement to resign. From the filing of the complaint through closing argument, Wolford and King both insisted that Wolford had to resign to avoid termination. *See, e.g.*, J.A.I 28, complaint ("Faced with the options of resigning or being fired, Plaintiff had no alternative but to resign"); 78, opposition to summary judgment motion ("The only reasonable inference is to be drawn is that [sic] Wolford's contracts would have been terminated unless he resigned"); 1365 (closing argument at trial, where Wolford's counsel told the jury that Wolford's resignation was necessary to avoid certain termination). If Wolford would have been terminated anyway absent the resignation, the inducement to resign caused no injury.

Wolford's contention on appeal that King would not have proceeded with the termination had the Field Practices investigation not been a "fraud" is wrong. King never so testified. To the contrary, King testified at trial that he resisted complying with MassMutual's *initial* effort to terminate Wolford, which was for cause over the Norman APS, *not* the final June 8 directive by MassMutual to terminate Wolford at will. *See* J.A.I 1092 ("I wasn't being asked to terminate him at will. I was being asked to terminate him for filling in over a physician's signature. It would have been easier to terminate him at will"). *Compare also* J.A.I 439 (March 18, 1997 letter directing King to terminate Wolford for misconduct) *with* J.A.I 463 (final July 8, 1997 letter directing termination without providing cause). King admitted that, under Tennessee law, "you don't have to have a reason" to terminate an agent at will. (J.A.I 1031).

As to MassMutual's final termination directive of July 8, King's testimony was clear and unequivocal: he knew that he had to comply with the directive to terminate Wolford because he (King) would be terminated by MassMutual if he refused and MassMutual would then terminate Wolford directly: "They [MassMutual] were going to give me instructions to terminate him [Wolford]. ***They would terminate me, if I didn't terminate him. If . . . if they were to terminate me and get me out of the way, they could terminate him. They are the successor G.A.***" (J.A.I 1090) (emphasis added). Therefore, had Wolford not resigned, King would have terminated him, as King had no alternative in the matter. (J.A.I 1049-50).

The Petition never accounts for this dispositive testimony and instead quotes misleadingly from King testimony regarding the prior directive to terminate Wolford for misconduct. *See* Pet. at 11-13. Such testimony is immaterial. There is not the slightest shred of evidence that King would have defied MassMutual and triggered his own termination by refusing to terminate Wolford. And even if he had such an intent, MassMutual would have replaced him and fired Wolford anyway. (J.A.I 1050).

The whole thrust of the Petition therefore is groundless. There simply is no evidence that, as of July 8, King was willing to fall on his sword in a futile effort to protect Wolford from an at-will termination or that, had he done so, he would have deterred MassMutual from terminating him and Wolford alike. Wolford's at-will relationship with MassMutual was doomed no matter what course King and Wolford elected.

2. The Jury Verdict.

As Wolford requested, the jury was charged on whether King had fraudulently induced him to resign his career agent contract by promising him a broker contract and continued commissions: "The contested issues of fact are as follows: . . . . Whether the defendants through their agent Tom King intentionally motivated plaintiff to resign his career contracts ***with the inducement plaintiff would retain his commissions if he so resigned*** and by such inducement via Tom King the defendants intentionally misrepresented the facts." (J.A.I 1392) (emphasis added). The jury was not charged to consider whether the Field Practices investigation was a fraud. Thus, the "promise of commissions" claim was the lone fraud theory pled, tried, charged, and found by the jury.

Despite the glaring, fatal flaws in Wolford's case, the jury returned a mixed verdict. While it found that MassMutual was a party to the King-Wolford career agent contract, thereby precluding Wolford's tortious procurement claim as a matter of law (J.A.I 164), the jury found in Wolford's favor on fraud, issuing a general verdict with no specific findings and awarding Wolford $1.9 million in compensatory damages and $54.9 million in punitive damages. (J.A.I 167, 175).

After post-trial motions, the district court ordered a new trial on punitive damages unless Wolford accepted a remittitur to $7.6 million, which he did, conditionally. (J.A.I 805-07, 886). In the course of the post-trial proceeding, Wolford argued for the first time that the whole Field Practices investigation was a fraud (an assertion that has continuously evolved in appellate proceedings as well). The court accepted this and entered judgment on the fraud verdict, concluding

that King would not have terminated Wolford had Wolford not resigned and that King had been misled into recommending resignation. (Pet. App. 45a-47a).

3. New Evidence.

While the case was pending on appeal to the Sixth Circuit, but within the time period provided under Fed. R. Civ. P. 60(b), remarkable newly discovered evidence came to light: a tape recording of the key Wolford-King telephone call which proves that Wolford and King *never* discussed resignation of the career agent contract or retention of commissions by switching to a broker's contract. This recording flatly disproves the fraud claim and the sworn testimony of Wolford and King:

- On the tape, King did *not* suggest that Wolford resign in lieu of termination. Instead, King asked Wolford what he intended to do, and Wolford said that he had set up a dummy corporation with another agent whereby Wolford could continue to write MassMutual policies and collect commissions without disclosure to MassMutual. King liked the idea so long as the ruse proceeded unbeknownst to MassMutual. (J.A.II 329-31, 336, 348-49).

- King did *not* promise Wolford that if he resigned and entered a broker contract he would keep his commissions.

- Far from stating that he would support Wolford to the bitter end and would not terminate Wolford absent proof of legitimate cause, King flatly stated that "I've come [within] a gnat's ass at getting my own contract terminated on this thing." (J.A.II 331).

- King and Wolford both acknowledged that they had no alternatives other than the dummy corporation ruse. King asked if there were anything else that Wolford wanted him to do, and Wolford said, "Hell, there ain't nothing else to do, Tom." (J.A.II 331-32). King agreed. (J.A.II 332; *see also* J.A.II 348-49).

The tape flatly disproves Wolford's fraud claim. Indeed, King and Wolford repeatedly acknowledged that Wolford's relationship with MassMutual was ending and that he could stay with MassMutual only through a subterfuge of establishing a corporation that concealed his name, a ploy that King actually endorsed. Wolford was even prepared to use other carriers, whose contracts were waiting on his desk.

If that damning tape of the very conversation about which Wolford has cried "fraud" were not enough, the tape also recorded an earlier conversation between King and Gary McMahan of MassMutual's home office. At trial, King testified that, in this conversation, McMahan had blessed King's plan for Wolford to resign and switch to a broker's contract. (J.A.I 1040-43). The tape reveals a diametrically different conversation, proving beyond question that King knew that the termination was non-negotiable, that King accepted the order to sever ties with Wolford without regard to any finding by Field Practices, and that King had ***never*** cleared the broker contract with McMahan. For example, McMahan warned King that he had no option other than terminating Wolford: "I just don't know that you have any choice in the matter." King replied, "Okay." (J.A.II 353-54, 358). King accepted defeat, saying, "I don't think there's any question the call's been made." (J.A.II 359). He agreed to terminate Wolford accordingly. (J.A.II 359-60).

Thus, if the Wolford-King recording leaves any doubt as to King's marching orders or as to King's acquiescence, the McMahan-King recording is conclusive. It proves that McMahan did *not* authorize a broker contract and instead ordered King to sever the relationship, offering no explanation and giving King no option. Wolford's position here, that King was hoodwinked by MassMutual's accusations, flies in the face of the tape.

After discovering the recordings, MassMutual moved for a new trial under Fed. R. Civ. P. 60(b). The trial court denied the Rule 60(b) motion, ruling that the tape recordings were cumulative of the trial evidence and new evidence submitted by Wolford and King, namely affidavits that they had had many conversations during the period and that the substance testified to at trial must have occurred at some other date. (J.A.II 14). Wolford and King provided no details as to what was said or when, and instead simply submitted phone records showing a series of calls over several weeks. MassMutual appealed that ruling, and the Sixth Circuit consolidated the appeals for oral argument.

4. The Sixth Circuit.

Faced with this record, the Sixth Circuit unanimously reversed and directed entry of judgment in favor of MassMutual based upon Wolford's failure to prove any injury resulting from his resignation. (Pet. App. 1a-7a). Specifically, in an unreported opinion, the panel ruled that Wolford had failed to adduce evidence that King's suggestion that he resign had caused him any injury when the record was uncontroverted and replete with evidence that, had he not resigned, he would have been terminated, either by King or, if King refused, by MassMutual after firing King and

replacing him as successor general agent. *Id.* at 6a-7a. The Sixth Circuit concluded, "had the fraud not occurred, Wolford would not have resigned but King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without the nonvested commissions or other damages he claims." *Id.* at 7a.

In so ruling, the Sixth Circuit rejected the arguments as to King's supposed unwillingness to terminate Wolford, noting that: (1) King's protests against MassMutual's finding of misconduct referred to the earlier directive by MassMutual to terminate Wolford due to the Norman APS, not the final directive to terminate him at-will; (2) King's "uncontroverted testimony stated that he would have fired Wolford had he not resigned"; and (3) King's termination of Wolford's broker contract confirmed that intent. *Id.* at 7a & n.2.

Wolford petitioned the Sixth Circuit for rehearing, both panel and en banc, raising the same issues that he asserts in the Petition to this court. The Sixth Circuit denied that petition without a single judge voting for panel or en banc rehearing. Unwilling to give up his quest for an unjust multi-million windfall, Wolford now petitions this Court, raising the same fact arguments that the Sixth Circuit rejected.

REASONS FOR DENYING THE PETITION

As nothing more than a fact-based protest against the Sixth Circuit's well-reasoned opinion, the Petition fails to identify any issues warranting this Court's review. The petition should be denied for numerous reasons:

1. In abject disregard of the admonition in S. Ct. R. 10 that "[a] petition for a writ of certiorari is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law[,]" Petitioner asserts only fact issues and an alleged misapplication of the standard for granting judgment as a matter of law. He does not assert any legal issues requiring resolution by this Court, let alone significant unsettled questions of law that might warrant certiorari.

2. In his application for additional time to file the Petition, Wolford promised that he would present "important questions relating to an issue that has previously been recognized by this Court as dividing the [circuit] courts of appeals."[2] No such argument is raised here.

3. Petitioner does not assert a conflict between the circuits, nor does he contend that the Sixth Circuit has consistently departed from this Court's standards or that the general public would be affected. Instead, Petitioner presents

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2. *See* Application for Extension of Time (Aug. 2, 2004) at 1 (stating that the Petition would address "whether a federal or state standard applies when reviewing a federal district court's decision on a motion for judgment as a matter of law under Rule 50 . . . in a case founded on the diversity jurisdiction"). *Id.* at 1-2. The Petition fails to explain its failure to raise the grounds asserted in the Application.

a simple (and pedestrian) question of whether the Sixth Circuit erred in holding that a fraud verdict lacks sufficient evidence for submission to the jury under Fed. R. Civ. P. 50.

4. Petitioner's fact-based challenge to the Sixth Circuit's decision is wrong and disingenuous. He sidesteps the reasoning of the Sixth Circuit, ignores critical uncontroverted evidence that make his fraud claim illusory, and instead claims, erroneously, that the Sixth Circuit engaged in impermissible "reweighing" of the evidence. (Pet. at 2). To the contrary, the Sixth Circuit simply recognized fatal fact flaws in his claim, flaws that Petitioner conspicuously fails to cure here.

5. Petitioner's assertion that the Sixth Circuit ignored fact findings by the jury or otherwise engaged in factfinding, *id.*, is particularly specious. The jury's verdict was general and involved no specific findings that were "reweighed" or rejected by the Sixth Circuit. (J.A.I 167). Indeed, rather than show material fact disputes that the Sixth Circuit resolved in favor of MassMutual, Petitioner rests upon a *new* theory of fraud that he never presented to the jury let alone proved with substantial evidence.

6. Finally, Petitioner fails to advise the Court of the post-trial discovery of the damning tape recording of the very phone conversations that he claimed lay at the heart of the "fraud". The tape not only disproves his testimony but also makes clear that his entire fraud claim was itself a massive deception. This is but one of many alternate grounds available to the Sixth Circuit warranting reversal of the judgment against MassMutual.

In sum, this case involves a routine application of judicial review of sufficiency of the evidence. It is a wholly unremarkable decision in which an appellate court pierced through the smoke and mirrors of a bogus fraud claim and properly determined that it had no merit.

A. The Petition Does Not Present Any Issue Of Law Warranting Certiorari.

It scarcely needs to be said that a routine appellate review for sufficiency of the evidence does not constitute a "compelling reason" for certiorari as set forth in S. Ct. R. 10. This Court has consistently held that certiorari should be limited to cases of "gravity and importance," *In re Woods*, 143 U.S. 202, 206 (1892), or to secure "uniformity of decision," *Lau Ow Bew v. United States*, 144 U.S. 47, 58 (1892). The Court "do[es] not ordinarily grant certiorari to review judgments based solely on questions of fact." *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 208 (1940); *accord Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (noting that a question presenting "primarily a factual issue . . . does not, by itself, justify the exercise of certiorari jurisdiction").

Certiorari should not be used to create an extra layer of appellate review and thereby defeat the congressional purpose in creating courts of appeal. *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897) ("Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal."). Indeed, this Court typically dismisses petitions as improvidently granted after briefing and argument make clear that the case "presented primarily with a question of fact, which does not merit Court review." *NLRB v. Hendricks County Rural Elec. M'ship Corp.*, 454 U.S. 170, 177 n.8

(1981) (declining to consider whether lower court properly held that evidence supported a finding); *Tacon*, 410 U.S. at 352; *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918) (dismissing a petition as improvidently granted after determining that only issue in the case was "the propriety of submitting" certain questions to the jury which "depended essentially upon an appreciation of the evidence").

Certiorari should be granted

> only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Forsyth, 166 U.S. at 514-15. The Petition falls woefully short of this standard.

B. The Petitioners' Fact-Based Disagreement With The Sixth Circuit Is Wrong And Does Not Warrant Certiorari.

The Petition also should be denied because its criticism of the Sixth Circuit is wrong. Wolford asserts that the Sixth Circuit's analysis is "woefully insufficient" to overturn the jury's verdict and ignores substantial evidence. (Pet. at 9). In support, Wolford cites King's testimony that he relied on MassMutual's investigation and an inference, drawn from other facts, that MassMutual was motivated to terminate Wolford to avoid having to pay him commissions on a mistaken decision to pay coal miners. *Id.* at 10-13. These

facts do not add up to *any kind of fraud*, *nor does Wolford's* overall complaint, that the Sixth Circuit mistakenly considered whether Wolford would have had the same injury but for the alleged fraud. *Id.* at 16.

First, the Petition rests upon a distinction without a difference. Whether Wolford was induced to resign by an alleged promise of commissions or by an investigation of possible misconduct, the analysis is the same. As the Sixth Circuit recognized, uncontroverted evidence demonstrated that Wolford's at-will relationship with MassMutual was doomed no matter what facts had been communicated to King. The uncontroverted evidence is that even if Wolford had done nothing, he would have been terminated by King directly or by MassMutual after terminating King and succeeding him as Wolford's general agent. (J.A.I 1090). Those outcomes would not have changed regardless of what King was told about possible misconduct by Wolford. Had King balked, MassMutual would have terminated King, replaced King as general agent, and then terminated Wolford directly. King so testified ("They would terminate me, if I didn't terminate him") (J.A.I 1090). The bottom line is the same: switching from one doomed at-will relationship (career agent) to another doomed at-will relationship (broker) caused Wolford no cognizable injury. *See, e.g., Bastian v. Petren Res. Corp.*, 892 F.2d 680, 684-85 (7th Cir. 1990) (if plaintiffs would have been injured "regardless of the fraud, any award of damages . . . would be a windfall").

Second, this red herring theory is remarkably devoid of evidence. Indeed, the evidence is starkly to the contrary. According to Wolford, the Field Practices investigation was a sham designed to intimidate him into resigning to avoid

termination by King. But the Field Practices investigation was conducted to enable *MassMutual*, not King, to decide whether to terminate Wolford's contract. MassMutual did not try to convince King that Wolford had committed misconduct and should be terminated for cause. To the contrary, it was King who consistently sought an explanation for the decision and who repeatedly complained about the lack of information from MassMutual. (J.A.I 458-60, 464, 1030, 1034-38, 1103-05). King even testified that, while he opposed the process, and was dissatisfied by the lack of specific grounds, "I am satisfied that they, based on the information that they understood they had, that they had a right to request a termination." (J.A.I 1104). Similarly, there is not a shred of evidence that MassMutual mentioned resignation to King, let alone plotted to trick King into pushing Wolford to resign. To the contrary, King testified that the broker's contract was *his* idea, and that he called MassMutual executives to sound them out on it. (J.A.I 1042-44). It defies all logic (not to mention the evidence) to suggest that MassMutual rigged the Field Practices investigation as a ruse to induce King to suggest resignation to Wolford, contrary to MassMutual's repeated written directives to terminate Wolford.

Wolford offers no evidence that such a far-fetched conspiratorial scheme ever existed. While he criticizes the Field Practices investigation and contends that its findings were erroneous, he offers no evidence that these were deliberately plotted by individuals, known or unknown, as a subtle ploy to induce King to induce Wolford to resign months later. Indeed, Wolford has not, and cannot, point to a single piece of evidence indicating that MassMutual *ever* preferred that Wolford resign. This theory is simply a far-fetched fantasy developed after the verdict to mask the fatal holes of his fraud claim.

Third, Wolford *never* presented his "Field Practices investigation" theory of fraud to the jury, and the trial court did not include it in its jury instructions, charging the jury instead to determine whether Wolford was falsely promised renewal commissions as an inducement to resign. (J.A.I 1392). Wolford never articulated this claim in his Trial Memorandum (J.A.I 104-05), Pretrial Order (J.A.I 154), or even in his closing argument (J.A.I 1365, 1375-76).

Fourth, Wolford's new fraud theory flies in the face of his successful effort to keep the damning Field Practices investigation results from admission into evidence. If the investigation was a sham as alleged, Wolford had no arguable basis for preventing the jury to know how the investigation was conducted and what evidence of wrongdoing it reported to MassMutual. Indeed, the ample evidence of serious misconduct and fraud unearthed by Hunady would have fully justified termination for cause had MassMutual so elected.

Fifth, Wolford's citation to MassMutual's allegedly nefarious intent to snatch his commissions (Pet. at 12-13) egregiously misstates the record. While he contends that "MassMutual admitted that the real reason [he] was losing his commissions was to compensate for the claims for benefits from his clients" (Pet. at 13), neither the cited reference, J.A.I 1059, nor any other evidence contains such an admission. The citation refers to a call that King reportedly made to MassMutual sometime in August, *after* the termination decision had been made, to ask why Wolford could not keep his commissions. Thus, it refers to whether Wolford could retain commissions even after he had been terminated, not whether retention of commissions were a motive for his termination.

Sixth, Wolford continues to ignore the lack of direct evidence in support of the fraud claim that *was* submitted to the jury: the allegedly false promise of renewal commissions.

Thus, the Sixth Circuit did nothing to "usurp[] the jury's fact-finding function" or to "misapprehend[] the essence of the cause or the effect of the fraud" or to misapply "the substantive state law remedy for fraud." (Pet. at 15). It simply addressed the fatal flaws in Wolford's case, flaws that no amount of smoke-and-mirror misdirection can fix.

Wolford's final contention, that the Sixth Circuit should have deferred to the trial court's lengthy analysis, also is wrong. Appellate review of denial of a Rule 50 motion is *de novo*. Courts of appeal often are called upon to reverse a jury verdict of fraud that lacks sufficient evidence even though the district court affirmed the verdict in its post-trial review.[3] In any event, the mere fact that the trial court's opinion was long does not make it correct. Like Wolford,

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3. *See, e.g.*, *Rambus Inc. v. Infineon Techs. Ag*, 318 F.3d 1081, 1105 (Fed. Cir. 2003) ("In sum, substantial evidence does not support the jury's verdict" as plaintiff 'did not show the first element of a Virginia fraud action[.]' . . . No reasonable jury could find otherwise. The district court erred in denying JMOL of no fraud on the . . . verdict."); *Laborers' Pension Fund v. A & C Envtl., Inc.*, 301 F.3d 768, 784 (7th Cir. 2002) (reversing denial of motion for judgment as a matter of law because "as a matter of law, A & C did not prove fraud in the execution"); *Hodge ex rel. Skiff v. Hodge*, 50 Fed. Appx. 22, 24, 2002 WL 31478870, at *2 (2d Cir. 2002) (reversing denial of motion for judgment of fraud because "there is no evidence in the record" of "false representations of fact"); *Aetna Cas. and Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 547 (6th Cir. 2000) (reversing district court's denial of motions for judgment as a matter of law with respect to the claims of fraud, conspiracy to commit fraud, and aiding and abetting fraud).

the court erred by failing to accept the fact that, under the pertinent contract terms and Tennessee law, neither Wolford nor King had the power to prevent MassMutual from terminating its at-will relationship with Wolford.

C. Summary Reversal Is Not Appropriate.

Wolford's request for summary reversal of the Sixth Circuit's decision warrants little comment. Suffice it to say, no decision on the merits should be made without affording the Court an opportunity to review the actual record. Wolford's misleading discussion of the facts certainly provides no basis for any such ruling. In any event, the only authority cited for this extraordinary request – a short-lived set of four half-century-old per curiam summary orders in FELA cases – hardly applies here. Justice Frankfurter's stinging dissent in the last of these obscure rulings aptly pointed out the manifest error in such actions, and the practice stopped. *See Gibson v. Phillips Petrol. Co.*, 352 U.S. 874, 875-76 (1956) (Frankfurter, J., dissenting).

Indeed, Wolford's claim of a serious injustice is badly misplaced. The Sixth Circuit picked just one of many alternate grounds for reversal. Numerous other grounds also exist: the Tennessee law of at-will contracts, the lack of an actionable misrepresentation of fact, the court's refusal to admit into evidence the actual results of the supposedly fraudulent investigation, and counsel's prejudicial argument that allowed the jury to award punitive damages to punish lawful counterclaims by MassMutual. But one issue stands out in particular: the newly discovered tape recordings of the very telephone conversations in which MassMutual allegedly made its fraudulent inducements. They flatly disprove the alleged misrepresentations and instead

demonstrate outrageous fraud by Wolford and King. Having himself perpetrated an odious deception on the courts, Wolford surely warrants no special treatment here.

CONCLUSION

This case presents a routine, pedestrian issue of sufficiency of evidence that does not warrant certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

BENJAMIN R. CIVILETTI*
NELL B. STRACHAN
MITCHELL Y. MIRVISS
VENABLE LLP
2 Hopkins Plaza
Suite 1800
Baltimore, Maryland 21201
(410) 244-7400

Attorneys for Respondent

* *Counsel of Record*

(3)

Supreme Court, U.S.
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No. 04-376

IN THE
Supreme Court of the United States

LEON WOLFORD,
Petitioner,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

November 2, 2004

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REPLY BRIEF FOR PETITIONER

The court of appeals did not overturn the jury's conclusion, which was affirmed by the district court, that petitioner had proven all of the elements of fraud except damages. "Without belaboring the other elements, any fraud by MassMutual did not injure Wolford." Pet. App. 5a. That conclusion ignores the substantial evidence from which the jury concluded that petitioner would neither have been terminated nor resigned absent MassMutual's fraudulent misstatements. Notwithstanding the jury's finding and the substantial evidence that supported it, the court of appeals overturned that judgment on the ground that "MassMutual's misrepresentations caused Wolford no injury." *Id.* at 7a.

That holding substitutes the court of appeals' view of the evidence for that of the jury. MassMutual does not dispute – or even address – this point. Instead, it attempts to undo the result reached at trial by re-litigating all factual aspects of its fraud. But the focus of the petition is on a point about which MassMutual is curiously silent: the court of appeals' erroneous finding that, "had the fraud not occurred, . . . King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without the non-vested commissions or other damages he claims." *Id.* That holding contradicts the record evidence and is judicial conjecture about events that never occurred. By failing to address the issue raised in the petition, MassMutual functionally concedes that petitioner *was* injured by its fraud and that the court of appeals had no basis in law for substituting its views of the facts for that of the jury's, which considered the evidence and made credibility determinations against MassMutual. Thus, summary reversal is entirely appropriate here.

Instead of defending the Sixth Circuit's *sua sponte* concoction of evidence on that point, MassMutual offers a grab-bag of arguments, all of which assume that the evidence should be viewed in a light *unfavorable* to petitioner, the verdict-winner. Not only are MassMutual's

arguments completely irrelevant to the error committed by the Sixth Circuit, they are wrong on their own terms.

A. MassMutual's Claim That It "Could Have" Terminated Wolford And King Is Irrelevant

MassMutual argues that it could have terminated its general agent Tom King at will, and thereafter stepped into King's shoes and terminated petitioner at will. MassMutual did neither of these things, yet now claims the mere possibility that it once could have done so gives it an absolute defense to the fraud found by the jury.

MassMutual is compelled to take this tortuous route because its executives testified that MassMutual lacked the authority to terminate petitioner's contract. *See* C.A. App. 1304, 1346. The career contract designated the parties as King and Wolford, and MassMutual is not listed as a party. *See id.* at 192. MassMutual admitted that the parties to the contract were King and Wolford, and that MassMutual's signature was only an approval of the contract and a guaranty of petitioner's commissions in the event of King's termination. *See id.* at 1164-65. A MassMutual executive stated that respondent intended to modify its contract to give it power to terminate "as opposed to going through the General Agent." That testimony admitted that MassMutual had no right to terminate petitioner under the contract as it existed. *Id.* at 1460. King testified that MassMutual did not have such authority and could only make recommendations, and that only the general agent had the authority to terminate the contract with the agent. *See id.* at 1070-72. Petitioner testified that only he or King could terminate his contract. *See id.* at 1014. If MassMutual had the power to terminate petitioner, the contract would have so provided, yet *King's contract with Wolford contains detailed termination provisions that do not include the right of MassMutual to terminate Wolford. See id.* at 194. Thus, the only condition under which MassMutual had any power to terminate petitioner's career contract with King *was if it first terminated King*. MassMutual concedes as much when it care-

fully states that it "arguably lacked direct authority to terminate [petitioner]." Opp. 2.

Yet that condition precedent never occurred. MassMutual therefore never had a right to terminate petitioner's contract with King. The contract was at will only between petitioner and King, and not between petitioner and MassMutual, contrary to MassMutual's implication regarding "Wolford's at-will relationship with MassMutual." Opp. 21. As the petition demonstrates, the jury had substantial evidence from which it could conclude that King would not have terminated petitioner's contract without a valid reason. The evidence further supported the conclusion that King would not terminate petitioner, a top producer, absent MassMutual's fraudulent representations because King believed petitioner had done nothing wrong. *See* C.A. App. 1087-89.

MassMutual thus argues that petitioner should be denied his verdict because of what MassMutual could theoretically have done. MassMutual puts it as follows: "The bottom line is the same: switching from one doomed at-will relationship (career agent) to another doomed at-will relationship (broker) caused Wolford no cognizable injury." Opp. 21. But those are not the facts. The issue at trial and before the court of appeals was not merely a switch of contracts; the issue was whether MassMutual fraudulently induced petitioner to resign his career contract. To use MassMutual's vernacular style, the bottom line is the same: had MassMutual not fraudulently accused petitioner of falsifying a claim form and soliciting applications from unqualified miners, neither King nor petitioner would ever have considered resignation or termination. The court of appeals' factual finding to the contrary contradicts the evidence in the record.

Although the court of appeals did not state that it was reversing the jury's verdict because petitioner's career contract with King was at-will and such contracts prohibit independent tort claims for fraud, MassMutual now makes that argument to this Court. *See* Opp. 2. However, the theoretical possibility that MassMutual could

have accomplished its end through legitimate means does not change the fact that MassMutual instead made fraudulent accusations that resulted in petitioner's resignation. Tennessee law does not permit a person to accomplish by fraud what may otherwise be done legally. *See Morris v. Morris*, 258 S.W.2d 732, 734 (Tenn. 1953). Intentional conduct designed to injure another in the rightful pursuit of business interests is an actionable wrong under long-established Tennessee law. *See Hutton v. Watters*, 179 S.W. 134, 135 (Tenn. 1915). *Hutton* discusses the difference between achieving an end by legal means and doing so through intentionally tortious conduct. *Id.* at 135-36. "In short, if an act be hurtful to another, intentional, and without legal justification, it is malicious in the true legal sense, therefore unlawful, and is actionable." *Id.* at 135. In *Hutton*, the court specifically noted that, in the context of employment at will, a person may discharge another for no reason but he may not do it "'solely for the purpose of injury to another, or hold a threat over the employee *in terrorem* to fetter the freedom of the employe[e], and for the purpose of injuring an obnoxious party.'" *Id.* at 138 (citation omitted).

MassMutual erroneously argues that a trio of cases demonstrate that it was immunized from fraud liability because it could have theoretically terminated King and then terminated petitioner at will. *See* Opp. 2. MassMutual's reliance is misplaced. Here, the jury found "that MassMutual made intentional misrepresentations to him to induce him to resign his career contracts with General Agent, Tom King." C.A. App. 167. The cases cited by MassMutual present classic employee at-will-termination issues. None involves a contract factually similar to petitioner's case, with three signatories having different rights and obligations.

B. MassMutual's Argument That Petitioner Did Not Plead Fraud Has No Merit

MassMutual asserts that "[t]he complaint did *not* allege the theory of fraud raised here, *i.e.*, that the Field Prac-

tices investigation was a sham intended to trick King and Wolford, through trumped-up allegations, into choosing resignation to avoid termination." Opp. 9. MassMutual cannot dispute, however, that petitioner's complaint put it on notice of his contention that its "field audit" consisted of "accusations, insinuations, and innuendo [that] were being used against him to undermine and damage his reputation and good standing with . . . General Agent King." C.A. App. 28. It was thus fully aware of that theory from the outset of the litigation.

C. MassMutual's Claim That Petitioner Was Not Informed He Could Retain His Commissions Overlooks Critical Evidence

MassMutual implies that King never informed petitioner that he could retain his commissions when he resigned his career contract and entered the broker contract. *See* Opp. 9, 13. However, MassMutual's selective culling of testimony reflects only a single conversation between King and petitioner. As the district court recognized, the two had many other conversations. King testified that, before petitioner resigned, he had telephone discussions with three of MassMutual's executives about allowing petitioner to "have a broker's contract to be in the information loop so he can do the service work *because he will be retaining his renewal stream.*" C.A. App. 1042 (emphasis supplied). King also testified: "they all suggested it made sense to them to allow him to continue with a broker's contract." *Id.* at 1043. King further testified he had a subsequent telephone conversation with petitioner about the broker's contract and told petitioner: "You will continue to get your renewals." *Id.* at 1045. Petitioner testified that King told him, "[I] think it would be in your best interest if you resign your career contract and took a broker contract because if you get terminated it will be very hard for you to get another AAA Carrier like MassMutual for you to work for." *Id.* at 944-45. All of this testimony demonstrates that petitioner had every reason to believe he would retain his commissions – and

the lost commissions constituted the crucial evidence of damages to petitioner. *See* Pet. 16 n.3.

D. MassMutual's Complaints About The Admission Of Certain Evidence Are Meritless

MassMutual asserts that Hunady's report – which contained notes concerning compound hearsay interviews he claims were conducted with miners – should now be considered, even though it was excluded at trial. There is no need to do so. The court of appeals explicitly noted that litigation discovery had shown that the true results of MassMutual's investigation were concealed, and that certain of MassMutual's accusations against petitioner were "wrong." *See* Pet. App. 2a-3a. And the court of appeals did not disturb the trial court's holding that the elements of fraud other than damage had all been proven at trial. Thus, the court of appeals indicated that there was legally sufficient evidence to prove MassMutual fraudulently induced petitioner to resign.

MassMutual asserts that petitioner's "contention here, that the investigation was a 'fraud,' is absurd, as that charge rests upon his effort to keep the [Hunady] report from the jury – an egregious error compounded by the court's inexplicable decision allowing *him* to introduce similar evidence from the investigation." Opp. 5. MassMutual again misleads. Although Hunady's hearsay report was excluded, his testimony was admitted at trial. The specific evidence excluded by the district court consisted only of "hearsay statements as a part of his report." C.A. App. 1233-34. The district court expressly permitted Hunady to "testify as to what he – as to the conclusion he reached after conducting the investigation, but I'm not going to accept hearsay statements as a part of his report. Okay?" MassMutual's counsel responded: "Okay. I understand." *Id.*

Indeed, MassMutual was not prevented from presenting evidence – including Hunady's testimony – about the basis for its termination requests as well as the Field Practices Committee's alleged reasons for asking King to terminate

petitioner.[1] The jury rejected MassMutual's accusations that petitioner submitted unqualified insurance applications.[2] The court of appeals' judgment did not rest on whether petitioner proved all elements of fraud, but rather on his alleged failure to present sufficient evidence that he was damaged by MassMutual's fraud.

E. MassMutual's Purported New Evidence Was Properly Rejected By The District Court

MassMutual asserts that a tape recording of a telephone conversation between petitioner and King "flatly disproves the fraud claim and the sworn testimony of Wolford and King." Opp. 13. No discussion of this tape recording can be found in the court of appeals' opinion; indeed, this purported evidence was not addressed in any way by the court of appeals.

The tape recording was presented to the district court during the pendency of the appeal to the court of appeals.

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[1] For example, King's letter of June 5, 1997, to MassMutual sets forth the specifics of Hunady's investigation as described by MassMutual to King and Wolford in their June meetings. This letter states that MassMutual claims Hunady interviewed "30+?" of Wolford's clients and "19+" state the applications are inaccurate and "8+" are spending a lot of time underground as laborers. C.A. App. 499-500. Additionally, MassMutual introduced a three-page summary of the FPC's and Hunady's investigation that states, *inter alia*: "Based on . . . over 30 interviews of miners, there were numerous cases in which the applications . . . inaccurately listed the duties of miners and the extent of the underground activity." *Id.* at 768-70.

[2] Nor is MassMutual's characterization of what was said by the miners at deposition (Opp. 5) accurate. For example, when Hunt referred to information that "definitely was not accurate," he was speaking of Wolford's description of a health insurance policy issued by Golden Rule Insurance – not a MassMutual policy. Marcum, Fritz, and Hunt met the job description and time underground requirements. *See* C.A. App. 1507, 1514-15, 1526, 1528, 1531, 1542. Marcum's allegedly inaccurate medical history referred to by MassMutual was completed by a nurse, not by Wolford. *See id.* at 1507, 1514-15. Fritz's comment "that's not right" referred to percentages of management duties, not time underground, *id.* at 1530-31, as the applications themselves contained nothing about time underground.

The district court issued a 17-page decision rejecting MassMutual's motion under Federal Rule of Civil Procedure 60(b). A copy of the district court's decision, which rejected the contention that the tape was any more than cumulative evidence, is reproduced in the attached Appendix. The district court stated in pertinent part:

> The tape recording presented by defendant has nothing to do with the misrepresentations concerning the Grant Norman APS [claim form] or the nine applications submitted by plaintiff.
>
> The premise of defendant's Rule 60(b) motion is that King's and Wolford's testimony does not match the single 16 minute taped conversation out of more than 90 minutes of their documented telephone discussions between July 11 and July 15. MassMutual has attempted to isolate this single July 13 conversation from the total context of this case and from the jury's verdict, found by clear and convincing evidence, of fraudulent misrepresentations which began as early as March 1997. The tape recording is merely cumulative of evidence considered by the jury and the court and would not have produced a different result if presented before the original judgment. Reply App. 10a-11a.

F. MassMutual's Contention That The Jury Was Not Properly Charged On Fraud Overlooks The District Court's Instructions

MassMutual falsely asserts (at 12) that "[t]he jury was not charged to consider whether the Field Practices investigation was a fraud." The district court instructed the jury twice, without objection by MassMutual, concerning petitioner's fraud claims: at the beginning of the trial and at the conclusion of the evidence. *See* Preliminary Instructions, 5/2/00 Tr., Vol. I, at 46; C.A. App. 1391-435. The jury was explicitly instructed that for petitioner to recover for intentional misrepresentation he must prove each of the elements by a preponderance of the evidence.

See C.A. App. 1419. The jury was also instructed that, if petitioner failed to prove any of the required elements, the jury must find for MassMutual. *See id.* at 1420. Contrary to MassMutual's suggestion that the jury did not consider issues relating to its investigation of petitioner, the jury was specifically instructed that the contested factual issues it would have to resolve included the following:

> "Whether plaintiff in adding material to the Grant Norman Attending Physician's Statement after the physician signed it intended to mislead defendants." *Id.* at 1394.
>
> "Whether plaintiff submitted applications for disability income insurance to defendants which plaintiff knew were fraudulent or misleading regarding:
> a. job titles of the applicants; and/or,
> b. the types of tasks or occupational duties performed by the applicants and /or
> c. the amount of time which the applicants spent underground and in mines performing their duties." *Id.* at 1393.

MassMutual did not object to those jury instructions, and cannot now claim that the jury never considered the bona fides of the charges that formed the basis for MassMutual's investigation.

G. MassMutual's Characterizations Of The Court Of Appeals' Judgment Shows Disregard For The Constitutional Right To A Jury Trial

MassMutual does not dispute, but attempts to trivialize, the fact that the court of appeals substituted its view of the facts for the evidence that the jury accepted in reaching its verdict. In doing so, the court of appeals usurped the jury's constitutional prerogatives under the Seventh Amendment.

MassMutual insists that what it characterizes as "routine appellate review for sufficiency of the evidence" does not constitute a "compelling reason" for certiorari and

that this Court "do[es] not ordinarily grant certiorari to review judgments based *solely* on questions of fact." Opp. 19 (internal quotation marks omitted; emphasis added). However, a court of appeals' Rule 50 review of evidentiary sufficiency raises not questions of fact, but rather questions of law that involve constitutional mandates of due process and the right to have juries, not judges, decide facts. This Court has held that review of the type conducted by the Sixth Circuit below impermissibly negates the "essential characteristic" allocating the "functions between judges and jury." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

When a court of appeals substitutes its version of the evidence for diametrically opposite evidence in the record, which was accepted by the jury – whether under the rubric of Rule 50, as here, or otherwise – the very integrity of the judicial process is at issue. When a court of appeals reweighs the evidence and substitutes its view of the evidence for that of the jury, the Fifth and Seventh Amendment rights to due process and a jury trial are implicated. This Court stands as the only bulwark guaranteeing the vitality of these constitutional mandates and protecting citizens from abrogation of their rights by a court of appeals, as was done here. From time to time, it is important for this Court to use a case to demonstrate those fundamental principles. Because respondent cannot defend the Sixth Circuit's encroachment on the jury function but instead devotes its entire Opposition to irrelevant matters that seek to obscure the fundamental error committed by the court below, summary reversal is entirely appropriate.

* * * * *

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

November 2, 2004

APPENDIX

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Memorandum and Order of United States District Court for the Eastern District of Tennessee (Knoxville) (Sept. 30, 2002) 1a

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:98-CV-110 (Phillips)

LEON WOLFORD,
Plaintiff/Counter-Defendant,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
MML PENSION INSURANCE COMPANY AND
C.M. LIFE INSURANCE COMPANY,
Defendants/Counter-Plaintiffs.

[Filed Sept. 30, 2002]

MEMORANDUM AND ORDER

Plaintiff Leon Wolford sued defendants for procurement of breach of contract and for intentional misrepresentation. The case was tried to a jury which found in favor of Wolford and awarded plaintiff compensatory damages of $1.9 Million Dollars and punitive damages of $54.9 Million Dollars on plaintiff's claim of intentional misrepresentation. The court remitted the punitive damages award to $7.6 Million Dollars. Following post-trial motions, final judgment was entered on April 23, 2001, and defendant MassMutual appealed to the Sixth Circuit Court of Appeals, where the appeal is now pending.

Defendant MassMutual moves for relief from judgment pursuant to Rule 60(b)(2), 60(b)(3) and 60(b)(6) on the basis of newly discovered evidence. The new evidence is a recently discovered tape recording of a telephone conversation between plaintiff and MassMutual's general agent,

Tom King, which defendant asserts directly refutes plaintiff's claim that he was fraudulently induced to resign his career contract as a MassMutual agent. Defendant requests an order directing MassMutual to petition the Sixth Circuit to remand the case to this court for further proceedings. Defendant also requests an order allowing discovery on the issues raised by this motion and relevant to whether the final judgment entered on April 23, 2001 should be re-opened or set aside [Doc. 175].

In support of its motion, MassMutual states that plaintiff's claim for fraud and misrepresentation was specifically grounded on his assertion that he was fraudulently induced by Tom King's statements to resign his career contract with King. Defendant states that plaintiff and King testified that these statements were made during a telephone conversation on July 13, 1997. Defendant asserts that a newly discovered tape recording demonstrates that the exchange between Wolford and King contained no promise regarding (1) the advantages of resigning rather than being fired, (2) a broker's contract with MassMutual, (3) the need to preserve Wolford's reputation and employability by another top rated company, (4) non-vested commissions, or (5) renewals. Thus, defendant argues, plaintiff's entire claim for intentional misrepresentation rests on false testimony about the July 13 conversation between Wolford and King.

Moreover, defendant avers the existence of the July 13 tape recording was concealed from MassMutual during discovery. At a deposition on April 7, 1999, King was asked to produce documents pertaining to Wolford, and in response King produced certain files. King never supplemented his document production in the Wolford case with the tape of the July 13 telephone conversation, and its existence was never disclosed to the defense.

After the verdict in this case, King filed his own lawsuit against MassMutual for tortious interference with his contract with Wolford. Counsel for MassMutual learned from King in a deposition that he routinely tape recorded

conversations and kept the tapes. When plaintiff was deposed in the King lawsuit, he testified that he learned of King's practice of tape recording conversations prior to his trial testimony in this case, but did not know that King had tape recorded their conversations regarding his resignation from MassMutual.

Counsel for MassMutual obtained a copy of the July 13 tape in discovery in the King case and it was eventually turned over to defense counsel in this case. Defendant avers these facts warrant relief under Rule 60(b)(2). Defendant states that the tape recording could not, in the exercise of due diligence, have been discovered in time to move for a new trial under Rule 59, and that the instant motion was filed within a reasonable time after discovery of the tape recording. Further, the tape recording contradicts Wolford's and King's testimony at trial and would likely change the outcome of the case.

Defendant also states that MassMutual is entitled to relief under Rule 60(b)(3) because King and Wolford concealed the existence of the tape recording from defendant until it was discovered in the King case. Defendant asserts that Wolford and King both testified consistently as to the same false version of their conversation. Lastly, defendant argues that relief is also warranted under Rule 60(b)(6) which provides relief in "exceptional or extraordinary circumstances."

Plaintiff has responded in opposition, stating that the misrepresentations committed by MassMutual to induce his resignation were extensive and were not limited to the subject matter of the tape recorded conversation of July 13. Plaintiff further states that all evidence appearing in the tape already exists in the trial record; the tape provides no new evidence; and all evidence in the tape is merely cumulative of evidence already considered by the jury and the court. Plaintiff never possessed or controlled the tape. He had no knowledge of the tape prior to its production by Tom King in King's case. Therefore, he committed no fraud, misrepresentation or other miscon-

duct. Moreover, had MassMutual been provided the tape prior to judgment, the tape would not have changed the jury's verdict or the judgment. The tape recording merely corroborates other trial evidence proving MassMutual's extensive misrepresentations. Therefore, plaintiff asserts that MassMutual's motion for relief from the judgment should be denied [Doc. 184].

In *First Nat'l Bank of Salem v. Hirsch*, 535 F.2d 343, 345-46 (6th Cir. 1976), the Sixth Circuit outlined the proper procedure for consideration by the district court of a Rule 60(b) motion filed while an appeal on the merits is pending. The aggrieved party should file its motion in the district court, not the Sixth Circuit. In considering the motion, the district court's jurisdiction is limited so long as the appeal is pending. It may (1) find that the motion appears to have some merit and therefore direct the movant to petition the Sixth Circuit to remand the case to the district court for further proceedings, (2) decline to consider the motion and let the appeal take its course first before entertaining the motion, or (3) deny the motion outright. *Id.*

Defendant's Rule 60(b) motion for relief is based on Rule 60(b)(2), 60(b)(3) and 60(b)(6), Federal Rules of Civil Procedure. Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (b) any other reason justifying relief from the operation of the judgment.

The decision to grant or deny motions under Rule 60(b) is discretionary with the district court. *Davis v. Jellico Community Hospital*, 912 F.2d 129, 132 (6th Cir. 1990).

In order to prevail on a Rule 60(b)(2) motion a "movant must demonstrate (1) that it has exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1996) (citations omitted). I find that although defendant has satisfied the "due diligence" requirement of Rule 60(b)(2), defendant has not shown that the evidence would have changed the outcome of the trial.

King's deposition was taken in the Wolford case on April 7, 1999. He was asked if there were any additional files relating to Wolford's termination or any communications with Wolford or his attorneys relating to this claim. On April 9, 1999, King provided counsel for both parties an additional piece of correspondence, but no tape recordings. MassMutual had no reason to believe that any other evidence existed in Tom King's files.

Counsel for MassMutual obtained the tape in December 2000, pursuant to a discovery request in the King case. Transcripts were made in February 2001. In October 2001, King confirmed that the tape was the transcript of his July 13, 1997 telephone conversation with Wolford. In preparation for Wolford's deposition, counsel contacted MassMutual's appellate counsel in November 2001. It was at that time that counsel learned that the tape had not been produced in the Wolford case and he provided a copy of the transcript to appellate counsel. The instant motion was filed on February 12, 2002.

I find that MassMutual was reasonable and diligent in relying on testimony and discovery responses by King that he had provided all evidence in his possession. Thus, defendant has shown that it exercised due diligence in obtaining the information and bringing it before the court; however, defendant has not shown that the tape recording is material evidence that would clearly have produced a different result at trial.

Under Rule 60(b)(2), "newly discovered evidence" applies to "evidence [that] is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 416 (6th Cir. 1998). As the Sixth Circuit explained, this means that the newly discovered evidence cannot be merely impeaching or cumulative.

The telephone records and affidavits of King and plaintiff submitted in response to defendant's motion confirm that King and Wolford had not one conversation as asserted by defendant, but multiple discussions between July 11, 1997 and July 15, 1997, the date of Wolford's resignation.

The telephone records reflect Wolford's telephone calls to Tom King during the relevant period in July 1997:

Date	Time	Number Called	Minutes
7/11/97	10:29 a.m.	531-0171	10
7/14/97	2:48 a.m.	531-0171	1
7/14/97	9:56 a.m.	531-0171	1
7/14/97	11:03 a.m.	531-0171	1
7/14/97	11:44 a.m.	531-0171	2
7/14/97	7:35 p.m.	531-0171	33
7/15/97	10:33 a.m.	531-0171	1
7/15/97	12:12 p.m.	531-0171	19

The telephone records also reflect King's telephone calls to Wolford:

Date	Time	Number Called	Minutes
7/14/97	3:15 p.m.	239-6270	16
7/15/97	11:02 a.m.	239-6270	9

As part of his response, plaintiff submitted the affidavit of Tom King who stated that at the time of the trial of this

case, he believed that he had a telephone conversation with plaintiff on July 13, 1997, but did not remember tape recording any of his telephone conversations with plaintiff. King further stated that the tape itself was not dated at the time it was made and no effort was made to determine the date of the tape until it was located during document production in his lawsuit against MassMutual. King first realized that the tape contained a conversation with plaintiff concerning his resignation when he listened to all his tape recordings in preparing his response to MassMutual's discovery request. When King listened to the tape, he told his wife that he thought the date of the conversation was July 13, 1997, and she wrote that date on the envelope containing the tape. This occurred months after the Wolford trial.

King further stated that he now believes that he was unintentionally misled about the exact date of the taped conversation with plaintiff. Plaintiff's resignation letter was dated July 13, 1997. King remembered that his conversations with plaintiff occurred just prior to receipt of Wolford's resignation. He assumed at trial that the taped conversation occurred on July 13 because Wolford's resignation was dated July 13. King stated that he received Wolford's resignation by fax on July 15, 1997 at 12:34 p.m. His copy of the resignation letter bears a fax stamp of July 15, 1997 at 12:34 p.m. The copy of Wolford's resignation letter presented at trial belonged to Wolford and did not contain the fax stamp showing its transmission date. After reviewing his telephone records, King stated that he now believes the tape recorded phone call occurred on July 14 instead of July 13. There are no long distance calls to plaintiff on his records dated July13, 1997.

In his affidavit, King verified that the substance of his testimony at trial was true and accurate. Before he received plaintiff's resignation, he told plaintiff during several telephone conversations, that he had been informed MassMutual had sufficient evidence to warrant plaintiff's termination; that he thought plaintiff should resign in

order to avoid being terminated; that plaintiff would not lose his renewal commissions; and that he expected that a broker's contract would be accepted by MassMutual. In addition, King attested his telephone records reflect that he made another call to plaintiff on July 15, 1997 which lasted approximately 9 minutes, and was placed approximately 90 minutes before he received plaintiff's resignation letter by fax. King stated that he had several telephone conversations with plaintiff about the need for his resignation prior to receiving plaintiff's resignation on July 15, 1997. King concludes by stating the tape recording at issue contains only a portion of his discussions with plaintiff and confirms the substance of his trial testimony.

Plaintiff submitted his own affidavit in which he states he testified at trial that before submitting his resignation to King he had a telephone conversation with King on July 13, 1997 in which King suggested that he resign from his career contract to avoid termination. He also testified that King told him that he could have a broker's contract if he resigned and that his renewals would continue. Based on that discussion, he submitted his resignation to King and entered into broker's contracts with King. He prepared and dated his resignation on July 13, 1997. Before he submitted his resignation, plaintiff states, King told him things were looking bad for him with MassMutual. King encouraged him to resign to avoid termination. King also told him he could have broker's contracts to service his existing clients, but not for new business. Further, King told him his renewal commissions and pension would continue. At his deposition in the King case, plaintiff was shown the transcript of a tape-recorded telephone conversation dated July 13, 1997. Plaintiff testified he was never aware that King tape recorded any of their conversations.

Plaintiff stated that he had reviewed his telephone records for June and July 1997, which confirm that he made several calls to King between July 11 and July 14. His

records also reflect an entry on July 15, 1997 at 12:31 p.m. which is the telefax communication of his resignation letter to King. Plaintiff attested that his testimony at trial was true and accurate as to the substance and sequence of events, but he may have been mistaken in his testimony that he had a telephone conversation with King on July 13, since the telephone records do not contain a call on that date. However, he believes that King called him on that weekend.

The affidavits of Wolford and King, along with their respective telephone records, show that they had several telephone conversations between July 11, 1997 (the date of MassMutual's request that King terminate his contract with plaintiff) and July 15, 1997 (the date of plaintiff's resignation). In fact, the records show that there were actually two telephone calls on July 14 – the 16 minute taped conversation relied on by defendant, and a subsequent 33 minute conversation that evening, along with 9 minute and 19 minute telephone calls on July 15 prior to plaintiff's facsimile transmission of his resignation.

The tape recording of the conversation between King and plaintiff does not contradict or refute the trial evidence. It merely reflects a single conversation between King and Wolford during the relevant period prior to Wolford's resignation on July 15, 1997. At best, the tape would be impeaching as to the date of the telephone conversation. Nevertheless, whether the conversation occurred on July 13 or 14, the substance of the tape is consistent with the trial evidence and is merely cumulative of the evidence presented at trial. The court is not convinced that introduction of the tape at trial would have produced a different result.

The evidence presented at trial showed that MassMutual made numerous misrepresentations prior to King and Wolford's phone conversations in July 1997. MassMutual misrepresented to plaintiff that he violated the company's rules and regulations by completing Grant Norman's APS and by supplying misleading information.

However, King testified that he presented copies of his e-mails from MassMutual confirming plaintiff complied with established procedure by completing the form. Further, evidence from Grant Norman and Dr. Vellayan confirmed that the information plaintiff added to the APS was correct.

Defendant also misrepresented to plaintiff that he had committed insurance fraud by submitting applications for insurance from unqualified clients. In June 1997, plaintiff and King met with MassMutual's Field Practices Committee, where plaintiff was told he submitted false information on eight applications. Arthur Foresi, director of underwriting for defendant, testified MassMutual conducted investigations to ascertain the accuracy of information contained in applications submitted by plaintiff. He acknowledged these independent investigations verified the information on the applications. Further, Matt Winter, a vice president of defendant, testified that MassMutual's applications contained provisions that authorized MassMutual to void the policies for any material misstatement or omission of facts, yet MassMutual canceled none of the alleged fraudulent policies.

Plaintiff requested the names of the applicants for the alleged misleading applications. King also requested this information, but neither plaintiff nor King were provided with the names of the applicants. Defendant issued subpoenas for nine applicants, presumably the same as those identified by the Field Practices Committee. MassMutual took video depositions from five; all confirmed that plaintiff explained the underwriting rules to them, they qualified, and the information in their applications was accurate. Defendant than canceled the remaining depositions. The tape recording presented by defendant has nothing to do with the misrepresentations concerning the Grant Norman APS or the nine applications submitted by plaintiff.

The premise of defendant's Rule 60(b) motion is that King's and Wolford's testimony does not match the single

16 minute taped conversation out of more than 90 minutes of their documented telephone discussions between July 11 and July 15. MassMutual has attempted to isolate this single July 13 conversation from the total context of this case and from the jury's verdict, found by clear and convincing evidence, of fraudulent misrepresentations which began as early as March 1997. The tape recording is merely cumulative of evidence considered by the jury and the court and would not have produced a different result if presented before the original judgment.

Defendant also argues it is entitled to relief under Rule 60(b)(3) based on fraud, misrepresentation or other misconduct of plaintiff. Clear and convincing evidence is required to support a Rule 60(b)(3) motion. *Jordan v. Paccar, Inc.*, 97 F.3d 1452 Table, 1996 WL 528950 *5 (6th Cir. 1996) *unpublished*. I cannot find by clear and convincing evidence that King's failure to produce the tape recording in this case was fraud, intentional misrepresentation, or other misconduct under Rule 60(b)(3).

Plaintiff submitted the affidavit of Marjorie Murrian, former administrative assistant to King. Ms. Murrian stated that over the years, King would regularly tape record some telephone conversations, sometimes the tapes would be transcribed, other times the tapes would be retained, but most of the time, the tapes were reused to record other conversations or for King's dictation. The retained tapes were generally not labeled and were kept in envelopes in a file cabinet. The tapes remained locked in the file cabinet for years and were forgotten about. Prior to his deposition in this case in April of 1999, King asked her to pull all of the files relating to plaintiff's resignation. After the deposition, King asked her to look to see if there were any other documents or information relating to plaintiff's resignation. She found one other document which was provided to MassMutual. Ms. Murrian stated that she was not aware that King had tape recorded any conversations with plaintiff relating to his

resignation and it did not occur to her to look for such tapes in response to King's request.

Ms. Murrian further stated that when MassMutual requested King to produce tape recordings relating to his lawsuit in the fall of 2000, King asked her to pull all the retained tapes so that he and Mrs. King could listen to them for the purpose of determining whether any might be relevant to his lawsuit. She stated that she had never seen King review the contents of the tapes before, and it was her belief that King did not conceal any information from MassMutual in the Wolford litigation. King specifically instructed her to preserve anything that could be related to the Wolford resignation and to provide copies of such information to MassMutual. She was never instructed to destroy or to conceal any information regarding Wolford's resignation.

Moreover, plaintiff stated in his affidavit that he did not know that King taped any of their conversations. Although he discovered that King taped some telephone conversations prior to his trial, he did not learn of the July 13 tape until his deposition in the King case in November 2001. He never had possession or control of the tape.

The affidavits of Majorie Murrian and Tom King explain how the unlabeled and undated tape was stored in King's office; how it was only located by King after the trial in this case; how it was produced by King when tapes were requested by MassMutual in the King case; and how it was incorrectly, but in good faith, dated by King as a July 13, 1997 conversation when the conversation actually occurred on July 14, 1997. Defendant has not shown that King's failure to disclose the existence of the tape was anything more than inadvertent mistake. The argument could be made that since Tom King was defendant's general agent, MassMutual constructively had knowledge and possession of the tape recording prior to the trial in this case. Moreover, Plaintiff was unaware of the existence of the tape prior to his deposition in the King case in

November 2001. Plaintiff had neither knowledge that a tape recording existed, nor did plaintiff have possession of the tape. Defendant had not shown that the failure to produce the tape in this case was the result of fraud, misrepresentation or other misconduct on the part of plaintiff or Tom King. Accordingly, defendant is not entitled to relief under Rule 60(b)(3).

Lastly, I find that Rule 60(b)(6) is inapplicable. Courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances that are not addressed by the first numbered clauses of the rule. *Pierce v. United Mineworkers*, 770 F.2d 449, 451 (6th Cir. 1985) *cert. denied*, 474 U.S. 1104 (1986). Notwithstanding the extraordinary nature of relief under Rule 60(b)(6), district courts may only employ the rule when "something more" than one of the grounds contained in Rule 60(b)'s first five clauses is present. *Hooper v. Euclid Manor Nursing Home, Inc.*, 667 F.2d 291, 294 (6th Cir. 1989).

Defendant's only asserted basis for its motion is the tape. Since defendant's motion fails as controlling new evidence, MassMutual has no further recourse under Rule 60(b). Since defendant cannot prevail on the Rule 60(b)(2) or 60(b)(3) claims, Rule 60(b)(6) cannot offer defendant relief in its stead. *See Flynt v. Brownfield, Bowen & Bally*, 726 F. Supp. 1106, 1111 (Ohio 1989).

Conclusion

For the foregoing reasons, defendant's motion for relief from judgment pursuant to Rule 60(b)(2), 60(b)(3) and 60(b)(6) is hereby **DENIED**.

IT IS SO ORDERED.

ENTER:

/s/ THOMAS W. PHILLIPS

Thomas W. Phillips
UNITED STATES MAGISTRATE JUDGE